

LIBRARY
SUPREME COURT, U.S.
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 431

**TESSIM ZORACH AND ESTA GLUCK,
APPELLANTS,**

vs.

**ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN,
GEORGE A. TIMONE AND JAMES MARSHALL,
CONSTITUTING THE BOARD OF EDUCATION OF
THE CITY OF NEW YORK, ET AL.**

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED NOVEMBER 16, 1951

PROBABLE JURISDICTION NOTED DECEMBER 11, 1951

INDEX

	PAGE
Statement Under Rule 284	1
Notice of Appeal to the Appellate Division....	2
Final Order Appealed From	6
Notice of Motion of Intervenor-Respondent, The Greater New York Coordinating Com- mittee on Released Time of Jews, Protes- tants and Catholics, for Final Order Dis- missing Proceedings	79
Opinion of DiGiovanna, J.	81
Stipulation Waiving Certification	99

Papers Read in Support of Petitioners' Motion For An Order to Rescind Regulations and Discontinue Program Respecting Released Time

Petitioners' Notice of Motion	11
Petition of Tessim Zorach and Esta Gluck....	13
Reply of Petitioners to Matter Set Forth in the Answer of Intervenor	71

Papers Read in Opposition to Petitioners' Motion For An Order to Rescind Regulations and Discontinue Program Respecting Released Time

Answer of Respondent, Board of Education of the City of New York	24
Affidavit of William Jansen	27
Affidavit of C. Frederick Pertsch	41

	PAGE
Affidavit of Richard M. Lubell	46
Affidavit of Anna Mungeer	48
Answer of Respondent, Commissioner of Education of the State of New York	50
Affidavit of Francis T. Spaulding	53
Exhibit A—Letter from District Super- intendent, Third Advisory District, to Dr. Charles Brind, State Education Department, dated May 13, 1948	56
Exhibit B—Letter from Board of Edu- cation, Albany, to John W. Parks, Superintendent of Schools, dated May 14, 1948	58
Exhibit C—Letter from the Superin- tendent of Schools to Dr. Charles Brind, State Education Department, dated May 13, 1948	61
Exhibit D—Letter from Superintendent of Schools, Watertown, to Dr. Charles Brind, State Education Department, dated May 18, 1948	63
Answer of Intervenor-Respondent, The Greater New York Coordinating Commit- tee on Released Time of Jews, Protestants and Roman Catholics	64
Papers Read in Support of Petitioners' Motion of Restoration to Calendar and for Directing Trial of Triable Issues and Other Relief	
Petitioners' Notice of Motion	73
Affidavit of Kenneth W. Greenawait	75

ADDITIONAL PAPERS ON APPEAL TO THE COURT OF APPEALS

	PAGE
Notice of Appeal to the Court of Appeals	101
Order of Affirmance of Appellate Division.....	103
Opinion of Appellate Division	107
Stipulation Waiving Certification of Record to Court of Appeals	112
Proceedings in Court of Appeals, State of New York	113 114
Opinion, Froessel, J.	114 114
Opinion, Loughran, Ch. J. (Concurring)	123 123
Opinion, Desmond, J. (Concurring)	123 123
Dissenting Opinion, Fuld, J.	131 131
Remittitur	143 142
Order on remittitur in Supreme Court of State of New York	147 143
Petition for appeal	151 145
Order allowing appeal	153 145
Citation on appeal (omitted in printing)	155
Assignment of errors	157 146
Stipulation	164 152
Statement pursuant to Paragraph 2, Rule 12, of the Rules of the Supreme Court of the United States (omitted in printing)	167
Statement of points to be read upon and designation of parts of record to be printed	170 153
Order noting probable jurisdiction	173 154



Supreme Court of the State of New York

1

APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of the Application of

TESSIM ZORACH and ESTA GLUCK,
Petitioners-Appellants,

for an order pursuant to Article 78 of the
Civil Practice Act,

against

2

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE
A. TIMONE, and JAMES MARSHALL, constituting
the Board of Education of the City of New York,
and FRANCIS T. SPAULDING, Commissioner of
Education of the State of New York,

Respondents,

directing them to discontinue certain
school practices,

and

THE GREATER NEW YORK COORDINATING COM-
MITTEE ON RELEASED TIME OF JEWS, PROTESTANTS
AND ROMAN CATHOLICS,

3

Intervenor-Respondent.

Statement Under Rule 234

This proceeding was commenced by the service of a verified petition and notice of motion on July 27, 1948.

On the original return day of said petition and notice of motion at Special Term, Part I, Supreme Court, Kings County on August 4, 1948,

4

Statement Under Rule 234

respondent Commissioner of Education moved to dismiss the petition in so far as it was addressed to and sought an order against respondent Commissioner of Education on the ground that the Supreme Court, Kings County, to that extent, was without jurisdiction to entertain this proceeding, or in the alternative to have the proceeding transferred to the Supreme Court, Albany County. By decision published December 30, 1948 and by order entered February 5, 1949, Mr. Justice George J. Beldock denied that motion (86 N. Y. S. 2nd 17); which decision and order were unanimously affirmed on appeals to the Appellate Division, Second Department, and the Court of Appeals (275 App. Div. 774; 300 N. Y. 613).

5

Pending said appeals this proceeding was otherwise stayed by court orders, except that by order entered herein on June 20, 1949 The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics was granted leave to intervene (195 Misc. 531).

6

The answer of respondent Board of Education of the City of New York was served on January 9, 1950. The answer of respondent Commissioner of Education of the State of New York, was served on January 9, 1950. The answer of intervenor-respondent, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, was served on June 24, 1949.

The reply of petitioners to matter set forth in the answer of intervenor-respondent was served on May 9, 1950.

Statement Under Rule 234

7

The names of the original petitioners are Tessim Zorach and Esta Gluck.

The names of the original respondents are Andrew G. Claúson, Jr., Maximilian Moss, Anthony Campagna, Harold C. Dean, George A. Timone, and James Marshall, constituting the Board of Education of the City of New York, and Francis T. Spaulding, Commissioner of Education of the State of New York. The name of the intervenor-respondent is The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics.

8

Petitioners' attorney is Kenneth W. Greenawalt, Esq. The attorney for respondent Board of Education is John P. McGrath, Esq., Corporation Counsel of the City of New York. The attorney for respondent Commissioner of Education is Nathaniel L. Goldstein, Esq., Attorney General of the State of New York. The attorney for intervenor-respondent is Charles H. Tuttle, Esq.

There has been no change in parties or attorneys herein since the commencement of the action, except for the intervention of The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics; and except that Francis T. Spaulding has died during the pendency of this proceeding. No successor Commissioner of Education has been substituted for him.

9

10 **Notice of Appeal to the Appellate Division**
SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

In the Matter of the Application of

TESSIM ZORACH and ESTA GLUCK,
Petitioners,

for an order pursuant to Article 78 of the
 Civil Practice Act,

11 *against*

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
 ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE
 A. TIMONE, and JAMES MARSHALL, constituting
 the Board of Education of the City of New York,
 and FRANCIS T. SPAULDING, Commissioner of
 Education of the State of New York,

Respondents,

directing them to discontinue certain
 school practices,

and

12 THE GREATER NEW YORK COORDINATING COM-
 MITTEE ON RELEASED TIME OF JEWS, PROTESTANTS
 AND ROMAN CATHOLICS,

Intervenor-Respondent.

SIRS:

PLEASE TAKE NOTICE that the petitioners above-
 named hereby appeal to the Appellate Division,
 Supreme Court, Second Department, from the
 final order herein signed by the Hon. Anthony
 J. DiGiovanna, a Justice of this Court, on the
 23rd day of June, 1950 and entered in the office
 of the Clerk of the County of Kings on the 24th

Notice of Appeal to the Appellate Division

13

day of June, 1950; and the petitioners appeal from each and every part of said order as well as from the whole thereof.

Dated: New York, New York, July 19, 1950.

Yours, etc.,

KENNETH W. GREENAWALT, Esq.,
Attorney for Petitioners,
One Wall Street,
New York 5, New York.

14

To:

HON. JOHN P. McGRATH,
Corporation Counsel,
Attorney for the Board of Education
of the City of New York, Respondent,
Municipal Building,
New York, New York.

HON. NATHANIEL L. GOLDSTEIN,
Attorney General,
Attorney for Commissioner of Education
of the State of New York, Respondent,
80 Centre Street,
New York, New York.

15

CHARLES H. TUTTLE, Esq.,
Attorney for The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent.

FRANCIS J. SINNOTT,
Clerk of the County of Kings,
Hall of Records,
Brooklyn, New York.

16

Final Order Appealed From

At a Special Term, Part I, of the Supreme Court, held in and for the County of Kings, at the Municipal Building, Court and Joralemon Streets, Borough of Brooklyn, City of New York, on the 23rd day of June, 1950.

Present—Hon. ANTHONY J. DiGIOVANNA, Justice.

17

In the Matter of the Application of

TESSIM ZORACH and ESTA GLUCK,

Petitioners,

for an order pursuant to Article 78 of the Civil Practice Act,

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE, and JAMES MARSHALL, constituting the Board of Education of the City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

Respondents,

18

directing them to discontinue certain school practices,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON-RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,

Intervenor-Respondent.

The petitioners having moved for an order directing the respondent, Francis T. Spaulding, as Commissioner of Education, to rescind and

Final Order Appealed From

19

abrogate the regulations respecting released time established by the Commissioner of Education, as described in the petition annexed to the notice of motion, and to issue an order to respondent, Board of Education, directing the said Board to rescind and abrogate the regulations respecting released time established by it as described in the said petition, and to discontinue the released time program, and further directing the respondent, Board of Education, to discontinue the released time program and abrogate and rescind all regulations established by it authorizing such released time program, and the motion having been "Marked Off" the Calendar pending a determination of a motion by the respondent, Francis T. Spaulding, Commissioner of Education of the State of New York, for a change of venue of this proceeding from Kings County to Albany County; and the Greater New York Coordinating Committee on Released Time of Jews, Protestants, and Roman Catholics having moved for an order permitting it to intervene as an intervenor-respondent herein, and an order having been entered in the office of the Clerk of the County of Kings on or about the 20th day of June, 1949, permitting the Greater New York Coordinating Committee on Released Time of Jews, Protestants, and Roman Catholics to intervene as an intervenor-respondent, and the petitioners having thereafter moved for an order (1) directing a trial in respect of triable issues of fact raised by the pleadings and accompanying papers, (2) the hearing of any objections in point of law in relation to the pleadings, and (3) argument upon the merits of petitioners' application, and the intervenor-respondent having

20

21

22

Final Order, Appealed From

moved for an order, (1) determining that the intervenor-respondent is entitled to a final order dismissing the proceedings on the merits in that the petition fails to state facts sufficient to constitute a cause of action, and the motions having duly come on before me to be heard,

23

Now, upon reading and filing the notice of motion of the petitioners, dated July 23, 1948, together with the petition of Tessim Zorach and Esta Gluck, verified on the 23rd day of July, 1948, annexed thereto, the answer of the respondent, Board of Education of the City of New York, verified on the 6th day of January, 1950, and the affidavits of William Janse, C. Frederick Pertsch, Richard M. Lubell, and Anna Mungeer, all sworn to on the 6th day of January, 1950, annexed thereto, the answer of the respondent, Francis T. Spaulding, Commissioner of Education of the State of New York, verified on the 9th day of January, 1950, together with the affidavit of Francis T. Spaulding, sworn to on the 9th day of January, 1950, with exhibits A, B, C and D annexed thereto, the answer of the intervenor-respondent, The Greater New York Co-

24

ordinating Committee on Released Time of Jews, Protestants, and Roman Catholics, verified on the 24th day of June, 1949, the notice of motion of the petitioners, dated April 6, 1950, together with the affidavit of Kenneth W. Greenawalt, sworn to on the 6th day of April, 1950, annexed thereto, the notice of motion of the intervenor-respondent, dated the 10th day of April, 1950, the reply of the petitioners to the matters set forth in the answers of the intervenor-respondent, verified on the 18th day of April, 1950, and after

Final Order Appealed From

25

hearing Kenneth W. Greenawalt, Esq., attorney for petitioners, in support of the petitioners' motions and in opposition to the motion of the intervenor-respondent; John P. McGrath, Corporation Counsel, Michael A. Castaldi, Assistant Corporation Counsel, of counsel, attorney for the respondent, Board of Education, in opposition to the petitioners' motions; Nathaniel L. Goldstein, Attorney General, attorney for the respondent, Francis T. Spaulding, Commissioner of Education of the State of New York, John P. Powers, Assistant Attorney General, of counsel, in opposition to petitioners' motions; and Charles H. Tuttle, Esq. and Porter R. Chandler, Esq., attorneys for the intervenor-respondent, in opposition to petitioners' motions and in support of the motion of the intervenor-respondent; and due deliberation having been had; upon filing the opinion of the Court, dated the 19th day of June, 1950, it is

ORDERED, that the petitioners' motion for an order directing a trial in respect of triable issues of fact raised by the pleadings and accompanying papers be and the same hereby is in all respects denied; and it is further

ORDERED, that the cross motion of the intervenor-respondent for an order determining that the said intervenor-respondent is entitled to a final order dismissing the proceedings on the merits in that the petition fails to state facts sufficient to constitute a cause of action, be and the same hereby is granted in all respects; and it is further

28

Final Order Appealed From.

ORDERED, that the objections of the respondents in point of law to the petition be and the same hereby are sustained; and it is further

ORDERED, that the application of the petitioners be and the same hereby is denied in all respects and that the petition be and the same hereby is dismissed on the merits as a matter of law.

Enter

A. J. D.

J. S. C.

29

FRANCIS J. SINNOTT

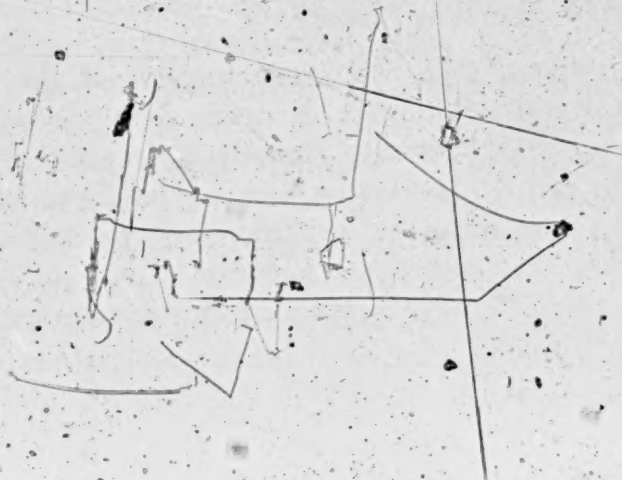
Clerk

Granted June 23, 1950.

FRANCIS J. SINNOTT

Clerk

30



**Notice of Motion of Petitioners Tessim Zorach
and Esta Gluck for an Order to Rescind
Regulations and Discontinue Program
Respecting Released Time**

31

SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Tessim Zorach and Esta Gluck, duly verified the 23rd day of July, 1948, the undersigned will move this Court at a Special Term, Part 1 thereof, to be held in and for the County of Kings, at the County Court House, Borough Hall, Brooklyn, New York on the 4th day of August, 1948, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order directed against respondents and commanding respondent Francis T. Spaulding as Commissioner of Education to rescind and abrogate the regulations respecting released time established by the Commissioner of Education as described in the annexed petition and to issue an order to respondent Board of Education directing said Board to rescind and abrogate the regulations respecting released time established by it as described in the said petition, and to discontinue the released time program as aforesaid; and further commanding respondent Board of Education to discontinue the released time program as aforesaid and abrogate and rescind all regulations established by it authorizing such released time program;

32

33

34 *Notice of Motion of Petitioners for an Order
to Rescind Regulations and Discontinue
Program Respecting Released Time*

and further, granting petitioners such other and further relief as may be just and proper in the premises.

Dated: New York, New York, July 23, 1948.

Yours, etc.,

KENNETH W. GREENAWALT

Attorney for Petitioners

Office & P.O. Address:

1 Wall Street

Borough of Manhattan

City of New York

To:

ANDREW G. CLAUSON, JR.

MAXIMILIAN MOSS

ANTHONY CAMPAGNA

HAROLD C. DEAN

GEORGE A. TIMONE

JAMES MARSHALL

constituting the Board of Education of
the City of New York,

110 Livingston Street

Brooklyn 2, New York

HON. FRANCIS T. SPAULDING

Commissioner of Education of the State
of New York

The State Education Department

Albany 1, New York

Petition of Tessim Zorach and Esta Gluck, 37
Read in Support of Petitioners' Motion
to Rescind Regulations and Discontinue
Program Respecting Released Time

SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

[SAME TITLE]

The petition of Tessim Zorach and Esta Gluck alleges:

FIRST: Each of the petitioners is a citizen of the United States and a resident of the State and City of New York in the County of Kings, and each is the owner of real property in the said county of Kings, assessed by the taxing authorities in a sum exceeding one thousand dollars (\$1,000), and has within one year previous here-to paid taxes upon such assessment. 38

SECOND: Petitioner, Tessim Zorach, is the father of a child of seven who resides with petitioner, and pursuant to the provisions of the Education Law, attends regularly at Public School No. 8 in the Borough of Brooklyn, City of New York. Petitioner, Esta Gluck, is the mother of two children aged twelve and eight, who reside with petitioner, and pursuant to the provisions of the Education Law, attend regularly at Public School No. 130 in the Borough of Brooklyn, City of New York. Said public schools numbered 8 and 130 are under the jurisdiction and control of respondent Board of Education and subject to the general supervision of respondent Francis T. Spaulding, as Commissioner of Education. 39

40 *Petition of Tessim Zorach and Esta Gluck, Read
in Support of Petitioners' Motion to Rescind
Regulations and Discontinue Program
Respecting Released Time*

THIRD: At all times herein mentioned, respondent Francis T. Spaulding was and still is Commissioner of Education of the State of New York, and as such is the Chief Executive Officer of the state system of education and of the Board of Regents, charged with the enforcement of all general and special laws relating to the educational system of the State and the execution of all educational policies determined upon by the Board of Regents; that, as such Commissioner of Education he is also entrusted with general supervision of all schools and institutions which are subject to the provisions of the Education Law of the State of New York, and is required by said Education Law to advise and guide the school officers of all districts and cities of the State in relation to their duties and the general management of the schools under their control.

41

FOURTH: Respondents Andrew G. Clauson, Jr., Maximilian Moss, Anthony Campagna, Harold C. Dean, George A. Timone, and James Marshall, constitute the Board of Education of the City of New York, and are charged with performance of any duty imposed under the Education Law or by regulations of the Commissioner of Education authorized by the Education Law.

42

FIFTH: Section 3212 of the Education Law requires your petitioners to cause their said minor children to attend regularly upon instruction during the entire term the appropriate pub-

*Petition of Tessim Zorach and Esta Gluck, Read
in Support of Petitioners' Motion to Rescind
Regulations and Discontinue Program
Respecting Released Time* 43

lic schools or classes are in session and that failure or refusal on the part of petitioners to cause their said minor children so to attend renders petitioners subject to punishment pursuant to the provisions of section 3228 of the Education Law.

SIXTH: On information and belief: Purporting to act pursuant to Section 3210 of the Education Law which provides that absence for religious education shall be permitted under rules that the commissioner shall establish, the predecessor in office of respondent Francis T. Spaulding on or about the 4th day of July 1940, established the following regulations, which are still in effect, stated by him to be permissive and not mandatory: 44

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil. 45

"2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

46 *Petition of Tessim Zorach and Esta Gluck, Read
in Support of Petitioners' Motion to Rescind
Regulations and Discontinue Program
Respecting Released Time*

4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

47 6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools.

SEVENTH: On information and belief: Purporting to act pursuant to said Section 3210 of the Education Law, respondent Board of Education on or about the 13th day of November 1940, established the following regulations:

48 "1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card coun-

*Petition of Tessim Zoruch and Esta Gluck, Read
in Support of Petitioners' Motion to Rescind
Regulations and Discontinue Program
Respecting Released Time*

49

tersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

50

3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week except that in classes on a departmental schedule release will be limited to the last period of the program.

51

5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

6. There shall be no comment by any principal or teacher on the attendance or

52 *Petition of Tessim Zorach and Esta Gluck, Read
in Support of Petitioners' Motion to Rescind
Regulations and Discontinue Program
Respecting Released Time*

non-attendance of any pupil upon religious instruction."

EIGHTH: On information and belief: Regulation 4 of the said regulations was amended by the Respondent Board of Education on September 24, 1941, to read as follows:

53 "4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

Said regulations have not otherwise been modified or rescinded and are still in full force and effect.

54 NINTH: On information and belief: Purporting to act pursuant to the aforesaid statute and regulations, respondent Board of Education has established and is continuing to operate in the public schools of New York City, including said public schools numbered 8 and 130, a system or practice of releasing children for religious instruction, commonly known as the released time system or program.

TENTH: On information and belief: The released time program in New York City is under the supervision of an organization known as the Greater New York Coordinating Committee on Released Time (hereinafter referred to as the Coordinating Committee). The Coordinating

*Petition of Tessim Zorach and Esta Gluck, Read
in Support of Petitioners' Motion to Rescind
Regulations and Discontinue Program
Respecting Released Time*

55

Committee was formed to promote religious instruction through use of the public school system and cooperates closely with the public school authorities in the management of the program and in promoting religious instruction.

ELEVENTH: On information and belief: Said released time program in New York City operates as follows: The Coordinating Committee or church authorities distribute either to parents of public school children at home or in churches or to public school children at or near the public school premises, cards for signatures to indicate the parent's approval to his child's being released for sectarian religious instruction during school hours. Children whose parents sign such cards deliver them to the public school authorities and they in turn deliver lists of the children whose parents so consent to the Coordinating Committee or to the religious centers. These children are released regularly for one hour each week from attendance at public school on condition that they attend during the released hour at the religious center for sectarian religious instruction. Parents who sign such consent cards thereby enter into an agreement with the public school authorities in consideration of their children being released from attendance at regular public schools, that their children will attend and receive sectarian religious instruction at the religious centers. Children whose parents do not sign consent cards are separated from the other children and are re-

56

57

58 *Petition of Tessim Zorach and Esta Gluck, Read
in Support of Petitioners' Motion to Rescind
Regulations and Discontinue Program
Respecting Released Time*

quired to continue in attendance at the public school. The children who are released receive sectarian, religious teaching in the faith of the center which they attend. At weekly intervals the religious centers file with the public school system and the Coordinating Committee a list of the children who have been released from public school but have not reported for religious instruction at the religious center.

59

TWELFTH: On information and belief: Administration of the system necessarily entails use of the public school machinery and time of public school principals, teachers and administrative staff.

THIRTEENTH: The operation of the compulsory education system of the State of New York as aforesaid assists and is integrated with the program of sectarian religious instruction carried on by separate religious sects and that pupils compelled by law to go to school for secular instruction are released in part from their legal duty upon the condition that they attend the religious classes.

60

FOURTEENTH: Upon information and belief: The operation of the released time program has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction.

FIFTEENTH: The operation of the released time program as aforesaid is a utilization of the

*Petition of Tessim Zorach and Esta Gluck, Read
in Support of Petitioners' Motion to Rescind
Regulations and Discontinue Program
Respecting Released Time*

61

State's tax established and tax-supported public school system to aid religious groups to spread their faith.

SIXTEENTH: The operation of the released time program has resulted and inevitably will result in divisiveness because of difference in religious beliefs and disbeliefs.

SEVENTEENTH: The limiting of participation in the released time program to "duly constituted religious bodies" effects an unlawful censorship of religion and preference in favor of certain religious sects.

62

EIGHTEENTH: The operation of the released time program as aforesaid and the regulations established by respondents violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the United States Constitution and made applicable to the States by the Fourteenth Amendment.

NINETEENTH: The operation of the released time program as aforesaid and the regulations established by respondents prohibit the free exercise of religion in violation of the First and Fourteenth Amendments of the United States Constitution and Section 3 of Article I of the New York Constitution.

63

TWENTIETH: That if Section 3210 of the Education Law is construed to authorize the establishment of the said regulations and the operation of the released time program as aforesaid, the

64 *Petition of Tessim Zorach and Esta Gluck, Read
in Support of Petitioners' Motion to Rescind
Regulations and Discontinue Program
Respecting Released Time*

said statute violates the First and Fourteenth Amendments of the United States Constitution.

65. TWENTY-FIRST: On or about the 27th day of June, 1948, your petitioners each duly demanded of respondents that they rescind the aforesaid regulations and discontinue the released time program in the public schools of New York and specifically in public schools numbered 8 and 130, but respondents have failed and refused to do so. The said refusals to rescind the regulations and to discontinue the operation of the released time program were illegal and constitute a dereliction of duty on the part of the respondent Board of Education of the City of New York and of respondent Francis T. Spaulding.

66. TWENTY-SECOND: Neither of the petitioners nor their children ever sought to take advantage of the released time system herein described, the child of petitioner Zorach receiving regular religious instruction during other than school hours at a Protestant Episcopal religious school, and the children of petitioner Gluck at a Jewish religious school.

TWENTY-THIRD: Rescissions of the aforesaid regulations and discontinuance of the released time program are non-discretionary duties imposed upon respondents by the Constitution of the United States and of the State of New York as aforesaid.

TWENTY-FOURTH: Petitioners have no other

*Petition of Tessim Zorach and Esta Gluck, Read
in Support of Petitioners' Motion to Rescind
Regulations and Discontinue Program
Respecting Released Time*

67

adequate remedy to procure the redress sought here.

WHEREFORE, your petitioners respectfully pray for an order directed against respondents and commanding respondent Board of Education to discontinue the released time program as described in the petition and abrogate and rescind all regulations established by it authorizing such released time program; and further commanding respondent Commissioner of Education to rescind and abrogate the regulations respecting released time established by the Commissioner of Education and to issue an order to respondent Board of Education directing said Board to rescind and abrogate the regulations respecting released time established by it as described in the petition, and to discontinue the released time program as aforesaid; and further granting petitioners such other and further relief as may be just and proper in the premises.

68

Dated: New York, New York, July 23, 1948.

69

TESSIM ZORACH
Petitioner

ESTA GLUCK
Petitioner

LP/CLSA

(Verified, by Petitioners on July 23, 1948)

70 Answer of Respondent, the Board of Education of the City of New York, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time

**SUPREME COURT OF THE STATE OF
NEW YORK**

COUNTY OF KINGS

[SAME TITLE]

71 Respondent, the Board of Education of the City of New York, by John P. McGrath, Corporation Counsel, for its answer to the petition herein:

1. Denies any knowledge or information thereof sufficient to form a belief with respect to each and every allegation contained in paragraph "First" of the petition, except admits that each of the petitioners is a resident of the State and City of New York, in the County of Kings.

72 2. Denies each and every allegation contained in paragraph "Fifth" thereof, except refers to Education Law §§3212 and 3228 for the text and legal effect thereof.

3. Admits each and every allegation contained in paragraph "Seventh" thereof and further alleges that the Board of Education of the City of New York established its regulations in accordance with the regulations of the Commissioner of Education.

4. Denies each and every allegation contained in paragraphs "Ninth," "Tenth" and "Eleventh," thereof, except as admitted in the affidavits hereto annexed, of William Jansen, C.

*Answer of Respondent, the Board of Education
of the City of New York, Read in Opposition
to Petitioners' Motion to Rescind
Regulations and Discontinue Pro-
gram Respecting Released Time* 73

Frederick Pertsch, Richard M. Lubell, and Anna Mungeer, each sworn to the 6th day of January, 1950.

5. Denies each and every allegation contained in paragraphs "Twelfth," "Thirteenth," "Fourteenth," "Fifteenth," "Sixteenth," "Seventeenth," "Eighteenth," "Nineteenth" and "Twentieth" thereof. 74

6. Denies each and every allegation contained in paragraph "Twenty-first" thereof, except admits that on or about June 27, 1948, petitioners demanded of respondent Board of Education of the City of New York that it rescind its regulations and discontinue the "Released Time Program" in the public schools of New York and specifically in the Public Schools Nos. 8 and 130; and further admits that respondent Board of Education has refused to do so.

7. Denies any knowledge or information thereof sufficient to form a belief with respect to so much of paragraph "Twenty-second" thereof as alleges that the child of petitioner Zorach receives religious instruction during other than school hours at a Protestant Episcopal religious school, and the children of petitioner Gluck at a Jewish religious school. 75

8. Denies each and every allegation contained in paragraphs "Twenty-third" and "Twenty-fourth" thereof.

76 *Answer of Respondent, the Board of Education
of the City of New York, Read in Opposition
to Petitioners' Motion to Rescind
Regulations and Discontinue Pro-
gram Respecting Released Time*

AS AND FOR A SEPARATE AND COMPLETE DEFENSE
THERETO, RESPONDENT BOARD OF EDUCATION OF THE
CITY OF NEW YORK ALLEGES:

9. The petition fails to state facts sufficient to
constitute a cause of action against the Board of
Education of the City of New York.

77 WHEREFORE, respondent, The Board of Educa-
tion of the City of New York, demands that the
application of the petitioners be denied in all
respects and that the petition be dismissed with
costs.

JOHN P. McGRATH,
Corporation Counsel,
Attorney for Respondent, The Board
of Education of the City of New
York,

Office and P. O. Address:

Municipal Building,
Borough of Mannattan,
City of New York.

78 (Verified by Morris Warschauer, Assistant
Secretary of Board of Education, on January 6,
1950.)

Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time

79

**SUPREME COURT OF THE STATE OF
NEW YORK**

COUNTY OF KINGS

[SAME TITLE]

State of New York }
County of Kings } ss.:

WILLIAM JANSEN, being duly sworn, deposes and says:

80

1. Since September 1, 1947, I have been the Superintendent of Schools of the City of New York. For a number of years prior thereto I was an Assistant Superintendent of Schools.

2. I am fully familiar with both the history and the manner in which the "released time program" operates in the City of New York.

The released time program for religious education was begun in New York City in February, 1941, following the enactment by the Legislature of Chapter 305 of the Laws of 1940, which amended Education Law Section 625 (now Education Law §3210 by adding thereto the following sentence:

81

"Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

In approving and signing the bill (Laws of 1940, Chap. 305) Governor Lehman said:

"Under this bill the State Commissioner of Education shall establish rules

82 *Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting,
Released Time*

under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education.

83 "For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: 'Neither the Constitution or the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.'

84 "However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agency of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules.

"A few people have given voice to fears that the bill violates principles of our

Affidavit of William Jansen, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time. 85

Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

In pursuance of such legislative authorization the State Commissioner of Education, on July 4, 1940, issued the following regulations which are still in force and effect: 86

"1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies. 87

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close

88 *Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

89 On November 13, 1940, the Board of Education of the City of New York promulgated the following rules and regulations to govern the operation of the released time program in New York City.

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

90 "2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a

*Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

91

record of pupils entitled to be excused, and will not be available or used for any other purpose.

"3. Religious organizations, in co-operation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

92

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week, except that in classes on a departmental schedule release will be limited to the last period of the program.

"5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

93

"6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

The foregoing rules have been continued in effect without change except Rule No. 4 which

94 *Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

was amended by the Board of Education on September 24, 1941 to read as follows:

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

95, Pursuant to such Rule 4, as amended, I have prescribed the following schedule for released time instruction at 2.00 p.m. on the day of the week indicated for each of the several boroughs in the City of New York as follows:

Bronx	—Tuesday
Brooklyn	—Wednesday
Queens	—Wednesday
Richmond	—Wednesday
Manhattan	—Thursday

96 These rules and regulations, together with other matters involving school administration, are sent by my office, from time to time, to all principals and other school officials concerned.

In compliance with the Education Law, the rules of the State Commissioner of Education, and the rules of the Board of Education of the City of New York, the "released time program" operates in New York City in the following manner:

The parent who desires to have his child

*Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

97

released for religious instruction signs a card
in the form substantially as follows:

“Registration for Released Time
Religious Instruction

New York City.....194.....

To....., Principal of..... School

Please excuse my child, of grade.....

98

one hour weekly on.....throughout
the rest of this school year, beginning

.....to go for religious instruction at

.....
(Name of Center to which child is to go)

(a)

(Signature of parent or guardian)

AddressPhone

(b) Provision has been made to accommo-
date and instruct this pupil.

99

.....
(Signature of Clergyman)

(Card to be retained and filed by the
Public School)

RS-1”

Such registration cards are prepared and dis-
tributed either by “The Greater New York
Coordinating Committee on Released Time”, a
committee wholly independent of our city schools,
or by the particular religious organization con-

100

*Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

101

ducting the religious instruction. Neither the Board of Education nor its school principals, teachers or other employees participate in any way in the distribution of such cards. Furthermore, the distribution of the cards is not permitted within the public schools. The preparation or printing of the cards involves no expense on the part of the Board of Education of the City of New York. When the card is received by the principal of the school, the principal notifies the teacher of the class wherein the pupil named in the card is enrolled, that such pupil is to be released at 2:00 p.m. on the day designated for religious instruction in that borough. At the appointed time—2:00 p.m.—without further announcement by the teacher in the classroom the child leaves the class and the school grounds and proceeds for religious instruction to the location specified by the religious organization. The dismissal of those pupils who participate in the released time program is effected in the same manner as the normal dismissal of pupils at the close of the school day.

102

The rules of the Board of Education provide that the religious organization is to notify the school principal each week of the attendance or absence of pupils upon religious instruction. In the event that a pupil is absent from religious instruction three times, the religious organization requires the parent to revoke the permission for the release of such pupil. Thus, the responsibility for the pupils' attendance upon their religious instruction is assumed solely by the

*Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

103

religious organizations in cooperation with the parents.

The registration cards are not available or used by the school authorities for any purpose other than as a record of pupils entitled to be excused.

3. In summary the chief characteristics of the "released time program" in New York City are as follows:

104

(a) The religious instruction is given outside the school buildings and grounds.

(b) The released time program is entirely permissive and voluntary. The pupil is excused for religious instruction only upon the joint written request of his parent or guardian and the particular religious organization.

(c) The absence of the pupil is limited to one hour a week, such hour to be the last hour of the school session. All the pupils of all religious faiths participating in the released time program are excused at the same time on the same day in the particular borough.

105

(d) The released time program is open to any religious organization, in cooperation with the parents of the pupils concerned, who desire to participate therein.

(e) The religious organization, in cooperation with the parents, assume full responsibility for attendance at the religious center and for the program of religious instruction thereat.

106 *Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

(f) The released pupils are dismissed from school in the usual way as in the case of other permitted absences.

(g) The school authorities have no responsibility beyond that assumed in regular dismissals.

107 (h) The parent's written request for the excuse of the child is filed with the school and is not available or used for any other purpose.

(i) The religious organization files with the school principal a card Attendance record for each pupil excused from the school pursuant to the parent's request.

(j) There is no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction.

108 (k) The planning necessary to accommodate pupils on released time is no greater than or different from that required when large numbers of pupils are absent in the schools of the City of New York for the purpose of observing religious holidays or by reason of inclement weather or serious illness in any particular community.

(l) The operation of the released time program entails no expenditure of public moneys.

The "released time program" operating in New York City is vastly different from the Champaign plan which was declared by the United States Supreme Court to be unconstitutional in the McCullum case. Set forth below in

*Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

109

parallel columns are the essential differences
between the Champaign Plan and the New York
City Plan:

Champaign Plan

No underlying enabling
State statute.

New York City Plan

1. Education Law §3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish".

110

Religious training took place in the school buildings and on school property.

The place for instruction was designated by school officials.

2. Religious training takes place outside of the school buildings and off school property.
3. The place for instruction is designated by the religious organization in cooperation with the parent.
4. No element of segregation is present.

111

Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils.

112

*Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

Champaign Plan

5. School officials supervised and approved the religious teacher.
6. Pupils were solicited in school buildings for religious instruction.
7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds.
8. Non-attending pupils isolated or removed to another room.

113

New York City Plan

5. No supervision or approval of religious teachers or course of instruction by school officials.
6. School officials do not solicit or recruit pupils for religious instruction.
7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved.
8. Non-attending pupils stay in their regular classrooms continuing significant educational work.
9. No credit given for attendance at the religious classes.
10. No compulsion by school authorities with respect to attendance or truancy.
11. No promotion or publicizing of the released time program by school officials.
12. No public moneys are used.

114

*Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

115

The view is widely shared among educators that since religion has to do with the highest values and aspirations of man it must play an essential role in education. From the mental hygiene point of view, it is important that children grow up in the security of those basic spiritual values which are woven into their cultural heritage. A sound religious education helps the individual to withstand conflicting stresses within the personality, to develop self-respect and true humility, to define values, to accept goals beyond immediate personal satisfaction, to make sacrifices for the general good, and to be truly tolerant of other races and religions. All of these qualities are essential to a well integrated personality.

116

While it is not the function of the public school to give religious education, the educator and the citizens of the community at large are aware that religious education is a factor in the development of the child's total personality.

117

In the administration of our public schools the Board of Education recognizes that such schools are non-sectarian and the instruction therein is confined to the secular. However, we also recognize the right inherent in a parent to direct the training and nurture of his child and that the child is not the mere creature of the state. The "released time program" as operated in the City of New York does nothing more and nothing less than to recognize such fundamental rights and principles. The secular instruction and the religious instruction are kept

118 *Affidavit of William Jansen, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

within their respective spheres. The principle of separation of church and state is thus kept inviolate.

119 In the operation of the "released time and program" in New York City, the school authorities scrupulously observe the principle of separation of Church and State. The very manner in which the "released time program" is operated in the City of New York precludes any violation of constitutional principles.

120 I am advised that any factual allegations in the petition concerning alleged defects in the operation of the released time program in two particular schools cannot affect or be determinative of the legality and constitutionality of the released time statute and regulations promulgated thereunder. Nevertheless, I have requested the principals of P.S. 8 and P.S. 130, Brooklyn, the schools in which the petitioners' children attend, to set forth the facts as to how the released time program operates in their particular school. I have read the annexed affidavits of Richard M. Lubell and Anna Mungeer, each sworn to January 6, 1950 and accordingly state that the released time program in those schools is functioning within the letter and spirit of the rules and regulations of the Board of Education.

WHEREFORE deponent prays that the petitioners' application be denied.

WILLIAM JANSEN

(Sworn to January 6, 1950.)

Affidavit of C. Frederick Pertsch, Read in 121
Opposition to Petitioners' Motion to
Rescind Regulations and Discontinue
Program Respecting Released Time

SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

[SAME TITLE].

State of New York }
 County of Kings } ss.:

C. FREDERICK PERTSCH, being duly sworn, de- 122
 poses and says:

1. I am an Associate Superintendent of
 Schools of the City of New York.

2. I am familiar with the various provisions
 of the "compulsory education law" and the
 manner in which such provisions are adminis-
 tered by the Board of Education of the City of
 New York. The pertinent provisions are as
 follows:

Education Law, §3204, subd. 1, provides that
 "a minor required to attend upon instruction
 * * * may attend at a public school or else- 123
 where."

Education Law, §3204, subd. 3, provides that
 the course of study for the first eight year of
 secular instruction shall encompass certain speci-
 fied subjects.

With respect to the "length of school ses-
 sions," Education Law, §3204, subd. 4, reads as
 follows:

"4. Length of school sessions. a. A
 full time day school or class, except as

124

*Affidavit of C. Frederick Pertsch, Read in
Opposition to Petitioners' Motion to
Rescind Regulations and Discontinue
Program Respecting Released Time*

otherwise prescribed, shall be in session for not less than one hundred ninety days each year, inclusive of legal holidays that occur during the term of said school and exclusive of Saturdays."

125

It may be noted that in the public schools of New York City the length of school sessions comprises about 190 days each year exclusive of legal holidays and Saturdays.

Education Law, §13205, subd. 1, provides that each minor from seven to sixteen years of age shall attend upon "full time day instruction." The statute, however, does not define the term "full time day instruction." This is covered in the By-Laws of the Board of Education which provide that "full time instruction" for classes above the first year grades shall consist of "two sessions aggregating five hours daily."

126

The By-Laws further provide that a class not receiving "full time instruction" shall be considered as receiving "short time instruction."

Such provisions of the By-Laws of the Board of Education relating to "full time instruction" and "short time instruction" are contained in §77, subd. 2 thereof which reads as follows:

"Class sessions shall be divided into full time and short time. Full time instruction shall be defined as follows: Four hours of instruction daily, consisting of 2 sessions separated by an interval of at least 1 hour for lunch, shall be considered full time for classes of the first year grades. Full

*Affidavit of C. Frederick Pertsch, Read in
Opposition to Petitioners' Motion to
Rescind Regulations and Discontinue
Program Respecting Released Time*

127

time in classes above the first year grades shall consist of 2 sessions aggregating 5 hours daily, separated by an interval of at least 1 hour for lunch, excepting that in hospital classes and classes for crippled children, 2 sessions aggregating 4½ hours daily, separated by an interval of at least 1 hour for lunch, shall be considered full time. When necessary, the interval for lunch herein provided may be shortened to not less than 30 minutes with the approval of the Superintendent of Schools, or it may be omitted in the case of classes of the first year grades with the like approval.

128

A full time class receiving all its instruction between 8:30 a.m. and 3:30 p.m. shall be classified as full time, regular schedule.

A full time class receiving part of its instruction either before 8:30 a.m. or after 3:30 p.m. shall be classified as full time special schedule.

129

A class not receiving full time instruction as hereinbefore defined shall be considered as receiving short time instruction. Permission to place classes on full time, special schedule, or short time shall be subject to the approval of the Superintendent of Schools."

By reason of special circumstances existing in some of our school areas, it is necessary to have "double sessions" on each school day.

130

*Affidavit of C. Frederick Pertsch, Read in
Opposition to Petitioners' Motion to
Rescind Regulations and Discontinue
Program Respecting Released Time*

Each session covers four hours. Such "double sessions" are held, for example, in schools where we are confronted with the problem of "overcrowding" occasioned, unfortunately, by presently inadequate school facilities. Nevertheless, such "double sessions" are recognized by the Commissioner of Education as being in compliance with the Compulsory Education Law and there is no lessening of "State Aid" thereby.

131

As to absence from required attendance, Education Law §3210, subd. b, provides as follows:

"b. Absence for religious observance and education shall be permitted under rules that the Commissioner shall establish."

132

Education Law, §3210, subd. 3d, provides that a minor who is required to attend upon full time day instruction "may be permitted to attend for a shorter school day or for a shorter school year or for both, provided, in accordance with the regulations of the State Education Department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that prescribed by the "compulsory education law."

In conformity with the rules established by the Commissioner of Education, the Board of Education has promulgated regulations which permit of absence for religious instruction to the extent of one hour on one day of each week.

*Affidavit of C. Frederick Pertsch, Read in
Opposition to Petitioners' Motion to
Rescind Regulations and Discontinue
Program Respecting Released Time*

133

2. The instructional machinery of our city schools is so geared as to comply in all respects with the provisions of the "compulsory education law." Such compliance is unaffected by the excused absence of pupils for one hour per week for the purpose of attending upon religious instruction. Those pupils who remain in school when others are released for religious instruction are given significant education work with emphasis on individual and remedial instruction. The pupils who are released are given comparable instruction, as the opportunity may present itself, at other times during the school week. In any event, the requirements of the "compulsory education law" are fully observed and administered alike to all pupils both as to "required attendance" and as to imparting instruction in the subjects mandated by Education Law, §3204, subd. 3.

134

C. FREDERICK PERTSCH

(Sworn to January 6, 1950.)

135

136 **Affidavit of Richard M. Lubell, Read in
Opposition to Petitioners' Motion to
Rescind Regulations and Discontinue
Program Respecting Released Time**

**SUPREME COURT OF THE STATE OF
NEW YORK**

COUNTY OF KINGS

[SAME TITLE]

State of New York }
County of Kings } ss.:

137 **RICHARD M. LUBELL**, being duly sworn, deposes and says:

I am the Principal of P.S. 130, Brooklyn, 70 Ocean Parkway, Brooklyn, New York, and have been the Principal since February, 1946.

Margie Gluck, one of the children of the petitioner Esta Gluck, is a pupil in my school in the fourth grade.

138 I am fully familiar with the manner in which children are released from this school for religious instruction and am fully familiar with all the rules, regulations and directives issued by the Board of Education concerning the release of children for religious instruction.

I have read the affidavit of William Jansen, Superintendent of Schools, sworn to January 6, 1950, and in so far as that affidavit sets forth the manner in which children are released from the public schools for the purpose of religious instruction I subscribe to the statements therein contained. The manner in which children are released in P.S. 130, Brooklyn, is in all respects consistent with the statements contained in that affidavit, except that in my school a bell is rung

Affidavit of Richard M. Lubell, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time

139

at 1:55 P.M. on each Wednesday (the time set for released time in Brooklyn) and at that time the teachers advise the children that those who have been excused may leave. No further comment is made.

Release of children for religious instruction on Wednesday afternoon is a matter of routine. Children who remain in school are given remedial and individual instruction on matters which they need. No new work is taken up during this last hour. All children, released and not released meet all requirements of the course of study. Any individual or remedial instruction that is needed by the children who go out on released time is given them by their teacher at some other time during the school week.

140

I have received no complaint or protest by any student or parent, including the petitioner Gluck in this case, concerning the released time practiced in my school.

RICHARD M. LUBELL

141

(Sworn to January 6, 1950.)

142 **Affidavit of Anna Mungeer, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time.**

SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

[SAME TITLE]

State of New York }
County of New York } ss.:

143 ANNA MUNGEER, being duly sworn, deposes and says:

I am a teacher assigned by the Board of Education during the absence of the Junior Principal to be the Acting Junior Principal of Public School 8, Brooklyn, located at 37 Hicks Street, Brooklyn, New York. From September, 1942 to date, I have been a teacher of the 8th grade in P.S. 8 and in charge of released time in my school.

144 Peter and Timothy Zorach, the children of the petitioner Tessim Zorach, are pupils in this school in the second and fourth grades, respectively.

I am fully familiar with the manner in which children are released from this school for religious instruction and am fully familiar with all the rules, regulations and directives issued by the Board of Education concerning the release of children for religious instruction.

I have read the affidavit of William Jansen, Superintendent of Schools sworn to the 6th day of January, 1950. The manner in which the children participating in the Released Time Pro-

*Affidavit of Anna Mungeer, Read in Opposition
to Petitioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

145

gram are released in P.S. 8 is completely in compliance with the Released Time Regulations of the Board of Education as set forth in the affidavit of Mr. Jansen, except that in my school a bell is rung at 1:55 P.M. on each Wednesday (the day set for released time in Brooklyn) and at that time the teachers merely announce that the children who have been excused may leave. No further comment is made. In this respect, the children are released in the same manner as in a normal dismissal at the close of the school day.

146

Release of children for religious instruction on Wednesday afternoon is taken as a matter of course by the other children who remain. Such children are given remedial and individual instruction on matters which they need. No new work is taken up during this last period and there is no interference with the teaching of required subjects. Any individual or remedial instruction that is needed by the children who go out on released time is given them by their teacher at some other time during the school week.

147

I have received no complaint, protest or criticism of any kind from any student or parent, nor from the petitioner Tessim Zorach or his two children, Peter and Timothy, concerning the released time practice in the school.

ANNA E. MUNGEER

(Sworn to January 6, 1959.)

148. Answer of Respondent the Commissioner of Education of the State of New York, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time

**SUPREME COURT OF THE STATE OF
NEW YORK**

COUNTY OF KINGS

[SAME TITLE]

149 The respondent Francis T. Spaulding, Commissioner of Education of the State of New York, as and for his answer to the petition herein:

FIRST: On information and belief, denies each and every allegation contained in paragraphs Ninth, Tenth and Eleventh thereof, except that he admits that a released time program is being carried on in the public schools of the City of New York and alleges that the said program is in all respects in accordance with the law, rules and regulations applicable thereto.

150 **SECOND:** Denies each and every allegation contained in paragraphs Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-Third and Twenty-Fourth thereof.

THIRD: Denies the allegations contained in paragraph Twenty-First thereof insofar as it is therein alleged that any action or failure to act on the part of this respondent was or is illegal and constituted or constitutes a dereliction of duty.

Answer of Respondent, Commissioner of Education of the State of New York, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time 151

OBJECTIONS IN POINT OF LAW

The respondent above named hereby objects in point of law to the petition upon the following ground:

1. The petition fails to state facts sufficient to constitute a cause of action against the respondent Commissioner of Education.

WHEREFORE, respondent Francis T. Spaulding, Commissioner of Education of the State of New York, requests that the petition be dismissed, with costs.

NATHANIEL L. GOLDSTEIN

Attorney General of the State of
New York

Attorney for Respondent Francis
T. Spaulding, Commissioner of
Education of the State of New
York

The Capitol
Albany, New York

To:

KENNETH W. GREENAWALT, Esq.

Attorney for Petitioners

1 Wall St.

Borough of Manhattan

New York 5, New York

152

153

154

Answer of Respondent, Commissioner of Education of the State of New York, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time

HON. JOHN P. McGRATH

Corporation Counsel of the City of New York
Attorney for Respondent Board of Education of the City of New York
Municipal Building
New York 7, New York

CHARLES H. TUTTLE, Esq.

155

Attorney for Intervenor-Respondent
15 Broad St.
New York 5, New York

(Verified by Francis T. Spaulding, Commissioner of Education of State of New York, on January 9, 1950.)

156

**Affidavit of Francis T. Spaulding, Read in
Opposition to Petitioners' Motion to
Rescind Regulations and Discontinue
Program Respecting Released Time**

157

**SUPREME COURT OF THE STATE OF
NEW YORK**

COUNTY OF KINGS

[SAME TITLE]

FRANCIS T. SPAULDING, being duly sworn, deposes and says:

1. That I am the Commissioner of Education of the State of New York, and one of the respondents named in the above-entitled proceeding.

158

2. That in accordance with the authority contained in Education Law, §§207 and 3210, subd. 1b, one of my predecessors in office promulgated the regulation quoted in full in paragraph SIXTH of the petition herein; that the regulation was duly approved by the Board of Regents of the University of the State of New York and filed in the office of the Department of State, and thereupon became and remains effective (N. Y. Const. Art. IV, §8; Executive Law, §36; State of New York, Official Compilation of Codes, Rules and Regulations, Vol. 1, p. 683).

159

3. That the Department of Education of the State of New York exercises general supervision over the practices of local boards of education and other local public school authorities in the matter of enforcing compliance with the provisions of the Education Law of the State of New York, including those providing for compulsory attendance (Education Law, Art. 65, Part 1, §§3201-3229); that the hours during which at-

160 *Affidavit of Francis T. Spaulding, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

tendance is required, the granting of individual excuses therefrom and the determination of the sufficiency of the reasons therefor are all matters generally within the province of local school authorities, with which the Department is not primarily concerned except in an advisory or supervisory capacity.

- 161 4. That in such capacity, the Department has prepared and distributed bulletins containing digests of the applicable statutory provisions, regulations promulgated thereunder, rules of procedure and forms for the information, assistance and guidance of local school authorities in such matters; that in the matter of the recognition of *bona fide* excuses which may be accepted as proper, warranting absence from attendance upon instruction in all schools, the Department has advised local school authorities that the following are among those that may be so accepted (Bulletin No. 1248, University of the State of New York July 1, 1943, pp. 30-32);

- 162
- Sickness of the pupil
 - Sickness or death in the family
 - Impassable roads or weather making travel unsafe
 - Religious observance
 - Quarantine
 - Required to be in court
 - Religious instruction or education (Regulation of Commissioner of Education, §154)
 - Approved instruction in music

Affidavit of Francis T. Spaulding, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time

163

5. That the matter of instituting so-called released time programs, or excusing pupils from attendance upon instruction in the public schools at the request of their parents or guardians for the purpose of attending religious meetings or classes, in accordance with the requirements of the aforesaid regulation of the Commissioner of Education (Reg., §154), is solely within the province of the local school authorities; that the Department is without information disclosing the number, extent or types of such programs in practice throughout the State.

164

6. That absence for one hour or less per week for such purposes, in accordance with the requirements of Regulation §154, is excused in many localities; that attached hereto as Exhibits A through D are letters addressed to Counsel for the Department of Education from local school authorities selected at random throughout the State, containing descriptive summaries of such practices prevailing in those particular localities, which practices are believed to be representative of those generally prevailing throughout the State.

165

/s/ FRANCIS T. SPAULDING

(Sworn to January 9, 1950.)

166

**Exhibit A, Annexed to Affidavit of
Francis T. Spaulding**

COPY

THIRD SUPERVISORY DISTRICT

ALBANY COUNTY SCHOOLS

HAROLD P. FRENCH
District Superintendent
TOWN HALL
Newtonville, New York

May 13th, 1948

167

Dr. Charles Brind
State Education Department
Albany 1, New York

Dear Dr. Brind:

Schools in this supervisory district follow slightly different procedures in arranging for released time for religious education. In most cases they follow along the two patterns which I am describing below.

168

At Menands (Colonie 15), pupils from all denominations and of all grades are excused for the last hour of the school day each Tuesday afternoon. The rest of the pupils remain in the classroom and receive instruction from the regular classroom teacher. This instruction is intended to review or enrich the lives of pupils, but no new problems are presented at this time.

Pupils are released following a written request from the parents. These requests are made on a blank which is furnished by the local Federation of Churches. Pupils are permitted to go to the church of their choice for instruction. The same blanks are used even though certain of the churches are not members of the Federation.

*Exhibit A, Annexed to Affidavit of
Francis T. Spaulding*

169

The church authorities are responsible for the pupils after they leave the school building. In the rare cases where pupils are not in attendance, the church authorities contact the school principal and notify her of the absence. They also contact the parents and attendance problems are handled by church and home cooperatively. Thus far, this school has never found it necessary to use any pressure. I imagine, however, that if reports continued that a child was absent without cause, the release of the pupil would be revoked and the child would be retained in the school for the hour.

170

In West Albany (Colonie 19), pupils are released in three different groups according to grade level. One group is released for the last hour on Monday, another for Tuesday, and the third for Wednesday. But one church organization utilizes this privilege and this church furnishes printed cards on which parents request that pupils be released. In other respects, conditions are similar to the conditions in Menands. Pupils who do not attend regularly are, after consultation with the home, refused the privilege of released time.

171

I trust that these two examples will furnish information which may be of value.

Cordially yours,

HPF/mbh

(sgd.) H. P. FRENCH

**Exhibit B, Annexed to Affidavit of
Francis T. Spaulding**

COPY

**CITY OF ALBANY, N. Y.
BOARD OF EDUCATION**

Commissioners

Neile F. Towner, President

Frank S. Harris

Dr. Frederic C. Conway

Superintendent of Schools

John W. Park

Business Manager

John R. Quinn

May 14, 1948

Mr. John W. Park

Superintendent of Schools

Albany, N. Y.

Dear Mr. Park:

The practice of granting released time to Public School children for the purpose of attending religious education has been maintained in the Albany schools for a good many years. Three or four years ago a pattern was set up in which all children desiring religious education left the schools on a given day of each week. This new pattern was arrived at by agreement among the representatives of the three major faiths and the Superintendent of Schools and the program since has been satisfactory to both the schools of religious education and the Public Schools.

The Albany Public Schools provide for released time for religious education in conformance with the Rules of the Commissioner of

*Exhibit B, Annexed to Affidavit of
Francis T. Spaulding*

175

Education as provided in Section 3210 of Article 65 of the Education Law.

Our practice is as follows:

Upon request in writing by the parent or guardian a pupil is excused from school during school hours for religious education to be conducted outside the school building and grounds.

Such absence is for one hour at the close of the session on one day of the week.

176

For the schools in the northern half of the city the day for released time is Wednesday and for the southern half it is Tuesday.

The courses in religious education have been or are currently being maintained and operated by duly constituted religious bodies as follows: Protestant, Catholic, Jewish.

Pupils are registered for the religious education courses by the religious authorities, and a copy of the registration is filed with the school principal.

A record for each child is also maintained in the keeping of the register.

177

Reports of attendance of pupils upon these courses are filed with the principal each week.

In the event of a child being illegally absent from these courses, notification is sent to the parent by the school principal.

The attitude of the public school personnel is to neither further nor detract or in any way influence an opinion on the attendance in or value of the religious education courses.

The above practices seem to be satisfactory to the religious authorities in the City of Albany.

178

*Exhibit B, Annexed to Affidavit of
Francis T. Spaulding*

It also appears to have widespread popularity since in accordance with the above, children from twenty-five out of twenty-eight schools are being granted released time for religious education. Two of the other three are secondary schools in which the dismissal is early enough for the children to participate without being excused.

Respectfully yours.

179

(Sgd) DAVID BRAY

David Bray, Chief
Bureau of Child Accounting,
Enforcement and Census.

DB/bhr

180

**Exhibit C, Annexed to Affidavit of
Francis T. Spaulding**

181

COPY

**OFFICE OF THE SUPERINTENDENT
OF SCHOOLS**

Rensselaer, New York

Kenneth H. MacFarland

May 13, 1948

Dr. Charles Brind
Counsel and Assistant Commissioner
State Education Department
Albany 1, New York

182

Dear Dr. Brind:

In response to your inquiry concerning the practices followed in the Rensselaer public school system with respect to the released time for religious instruction program, the procedure is:

- (1) All churches participating in the program present written requests to the Board of Education for the early dismissal of the pupils concerned. All churches in the city have agreed upon Wednesday as the day of the week and 2:00 P.M. as the hour of such dismissal.

183

- (2) The churches prepare printed permission forms which are supplied by them to the school pupils attending each particular church. These applications must be signed by the parents and presented to the school for approval. They are kept on file in the school.

184

*Exhibit C, Annexed to Affidavit of
Francis T. Spaulding*

- (3) The churches notify the particular school of the absence of pupils at the religious instruction period.

The principal of the school investigates such absence by determining, first, if the pupil were absent from school on that day. And if not, the pupil is interviewed to find out why he did not attend the religious instruction for which he was dismissed early.

185

If such absences from religious instruction continue over a period of weeks and the pupil is not absent from school, then both the church and the parents are notified that permission for early dismissal for such pupil has been revoked. No punishment is given the pupil who habitually remains away from religious instruction for which his request for early dismissal has been approved, other than the revocation of such permission.

186

I believe this outline covers completely our procedure on released time.

Very truly yours,

(Sgd.) KENNETH H. MACFARLAND
Kenneth H. MacFarland

**Exhibit D, Annexed to Affidavit of
Francis T. Spaulding**

187

COPY

**DEPARTMENT OF EDUCATION
Watertown, New York**

C. E. Sabin
Superintendent of Schools

May 18, 1948

Dr. Charles A. Brind, Jr.
Division of Law
The State Education Department
Albany, New York

188

Dear Dr. Brind:

I submit the following information relative to the excusing of children for religious education in the Watertown schools:

The Board of Education does not furnish buildings, supplies or teachers for the conducting of this instruction.

Children in the kindergartens and the first six grades are excused Wednesday afternoons at three o'clock upon the written request of parents made on forms supplied by the churches where the instruction is given.

189

Attendance records are kept by the teachers of the religious instruction and children tardy or absent are reported to the public schools where they attend. Attendance blanks and all other supplies are furnished by the churches involved.

The City of Watertown assumes no expense of any nature whatsoever for this instruction.

Very truly yours

(Sgd.) **C. E. SABIN**
Superintendent of Schools

190 . **Answer of The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time**

**SUPREME COURT OF THE STATE OF
NEW YORK**

COUNTY OF KINGS

191

[SAME TITLE]

The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, intervenor-respondent, for its answer to the petition of petitioners Tessim Zorach and Esta Glack:

192

1. Denies each and every allegation of Paragraph Sixth, except that it admits that pursuant to Section 3210 of the Education Law, the State Commissioner of Education on July 4, 1940 duly established the regulations set forth in said Paragraph Sixth, which are still in effect and are permissive and not mandatory.

2. Denies each and every allegation of Paragraphs Seventh and Eighth, except that it admits that on November 13, 1940 the Board of Education of the City of New York, for the purpose of effectuating in New York City the statutory authorization of released time established by Chapter 305 of the Laws of 1940 (Education Law Section 3210) and the rules established thereunder by the State Commissioner of Education, issued the rules set forth in said Paragraph Seventh, and thereafter on September 24, 1941

*Answer of The Greater New York Coordinating
Committee on Released Time of Jews, Protestants
and Roman Catholics, Intervenor-
Respondent, Read in Opposition to Petitioners'
Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

193

issued the amendment set forth in said Paragraph Eighth, and except that it admits that said regulations have not otherwise been modified or rescinded and are still in full force and effect.

3. Denies each and every allegation of Paragraphs Ninth through Twentieth, both inclusive, except that it admits that the released time program authorized by the 1940 legislation and the rules established by the Commissioner of Education of the State of New York and the Board of Education of New York City has at all times since been carried on in New York City in strict accordance with said statutes and regulations.

194

4. Denies each and every allegation of Paragraphs Twenty-first, Twenty-third and Twenty-fourth, except that it admits that petitioners Tessim Zorach and Esta Gluck demanded of respondents that they rescind their regulations with respect to the program of released time religious education, and that respondents have declined to do so.

195

FOR A FIRST SEPARATE DEFENSE:

5. The right to the free exercise and enjoyment of religious profession and worship and the right of parents to direct the training of their children and to have them instructed in religion and protected according to the convictions and conscience of such parents against governmental systems or implications which are, or are believed by such parents to be, contrary to or dis-

196 *Answer of The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time*

paraging or depreciating of religion or religious belief, are guaranteed by the Constitution of the United States and by the Constitution established by "The People of the State of New York, grateful to Almighty God for our Freedom". (New York Constitution. Preamble.) The State of New York, in furtherance of the public welfare and in recognition of constitutional rights to freedom of religious belief and practice, has the constitutional power to enact laws and adopt rules which, in the reasonable judgment of the legislature and competent public authorities, are appropriate for such purposes.

197 6. Petitioners Tessim Zorach and Esta Gluck have no lawful authority to interfere with those rights, or to direct the training or education of the children of others, or to prevent under color of judicial process or otherwise, parents who desire religious education for their children from causing such education to be given under the voluntary program set forth in the statute and regulations above mentioned.

198 7. The interference with freedom of religion and with the right of parents to direct the training of their children, sought to be established by petitioners herein, would be in violation of the Constitutions of the United States and of the State of New York.

FOR A SECOND SEPARATE DEFENSE:

8. The matter is *res judicata*, in that all of

*Answer of The Greater New York Coordinating
Committee on Released Time of Jews, Protes-
tants and Roman Catholics, Intervenor-
Respondent, Read in Opposition to Peti-
tioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

199

the questions presented have been determined adversely to the petitioners, in a proceeding heretofore brought by one Joseph Lewis, president of the so-called Free Thinkers of America, on his own behalf and on behalf of all citizens and taxpayers of the state against the State Commissioner of Education seeking the same relief as petitioners now seek. That proceeding is fully and truly reported in *People ex rel. Lewis v. Graves, Commissioner of Education of the State of New York*; 27 Misc. 135; aff'd. 219 App. Div. 233; aff'd. 45 N. Y. 195; reargument denied 245 N. Y. 620. This intervenor-respondent refers to the Record on Appeal therein with the same force and effect as if it were hereto annexed.

200

FOR A THIRD SEPARATE DEFENSE:

9. The matter is *res judicata*, in that all of the questions presented have been determined adversely to the petitioners in a second proceeding heretofore brought by the same Joseph Lewis, president of the so-called Free Thinkers of America, on his own behalf and on behalf of all citizens and taxpayers of the State, against the present respondents seeking the same relief as petitioners now seek. (*In the Matter of the Application of Joseph Lewis, petitioner, for an order against Francis T. Spaulding, Commissioner of Education of the State of New York and the Board of Education of the City of New York, respondents, the Greater New York Co-*

201

202

Answer of The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent, Read in Opposition to Petitioners' Motion to Rescind Regulations and Discontinue Program Respecting Released Time

ordinating Committee on Released Time of Jews, Protestants, and Roman Catholics, intervenor-respondent, hereinafter referred to as the *Second Lewis case*.) This Committee was, by order of the court therein, a party intervenor-respondent in that proceeding.

203

10. The *Second Lewis case* was commenced in the Supreme Court, New York County, in April 1948, and was thereafter transferred to Albany County. At the time when the petitioners Tessim Zorach and Esta Gluck commenced the present proceeding in August 1948, the *Second Lewis case* was pending undecided before Mr. Justice Elsworth in the Supreme Court, Albany County. On information and belief, the petitioners Tessim Zorach and Esta Gluck at and after the time when they commenced the present proceeding were advised and fully aware of the pendency of the *Second Lewis case*, and of the issues therein, and that it sought an adjudication on the same grounds as they have assigned in this proceeding for claiming that the New York Statute and Program for Released Time were unconstitutional; and they were invited to participate therein or to have their proceeding consolidated or heard therewith, but they declined to do so.

204

11. In November 1948 Mr. Justice Elsworth handed down a decision sustaining the constitutionality of the New York Released Time Program and directing the dismissal of the petition in the *Second Lewis case* (193 Misc. 66). A

*Answer of The Greater New York Coordinating
Committee on Released Time of Jews, Protes-
tants and Roman Catholics, Intervenor-
Respondent, Read in Opposition to Peti-
tioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

205

judgment was duly entered thereon, and peti-
tioner Joseph Lewis thereafter duly appealed to
the Court of Appeals from said judgment pur-
suant to section 588, subd. 4 of C.P.A. On in-
formation and belief, the petitioners Tessim
Zorach and Esta Gluck were advised of the pend-
ency of the appeal to the Court of Appeals in
the *Second Lewis case* and were invited to par-
ticipate therein; and they obtained an order to
show cause from the Court of Appeals why they
should not be granted leave to file an *amicus
curiae* brief therein.

206

12. When the *Second Lewis case* was called
for argument in the Court of Appeals on April
11, 1949, counsel for petitioner-appellant Joseph
Lewis, over the opposition of counsel for all the
respondents in that case (who are likewise re-
spondents in the present proceeding), and over
the opposition of this Committee as intervenor-
respondent, withdrew his appeal. Upon informa-
tion and belief, the withdrawal of said appeal of
petitioner Joseph Lewis was effected with the
knowledge and at the instigation of petitioners
Tessim Zorach and Esta Gluck, and with their
full consent, and was for the purpose on their
part and on the part of their counsel of fore-
stalling and preventing a decision by the Court
of Appeals in that case. This intervenor-re-
spondent refers to the Record on Appeal therein
with the same force and effect as if it were here-
to annexed.

207

208

*Answer of The Greater New York Coordinating
Committee on Released Time of Jews, Protes-
tants and Roman Catholics, Intervenor-
Respondent, Read in Opposition to Peti-
tioners' Motion to Rescind Regulations
and Discontinue Program Respecting
Released Time*

209

13. By reason of the judgment of Mr. Justice
Elsworth in the *Second Lewis case* and the with-
drawal of the appeal of petitioner Joseph Lewis
therein under the circumstances above stated,
the constitutionality of the New York Statute
and Program of Released Time for religious
education now attacked by petitioners has been
finally adjudged and these petitioners are con-
cluded thereby.

WHEREFORE, intervenor-respondent, The Great-
er New York Coordinating Committee on Re-
leased Time of Jews, Protestants and Roman
Catholics, prays that the application of the peti-
tioners Tessim Zorach and Esta Gluck herein be
denied and that their petition be dismissed.

210

CHARLES H. TUTTLE,
Attorney for The Greater New York
Coordinating Committee on Released
Time of Jews, Protestants and Roman
Catholics, Intervenor-Respondent,
Office and Post Office Address:
15 Broad Street
Borough of Manhattan
New York 5, N. Y.

CHARLES H. TUTTLE
PORTER R. CHANDLER
LOUIS M. LOEB,
Of Counsel

(Verified by Charles H. Tuttle, Chairman of
The Greater New York Coordinating Committee,
etc., on June 24, 1949.)

Reply of Petitioners to Matter Set Forth in 211
the Answer of the Intervenor, Read in
Support of Motion to Rescind Regula-
tions, and Discontinue Program Respect-
ing Released Time

SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

[SAME TITLE]

Petitioners, replying to matter, other than 212
 denials, set forth in the answer of the intervenor:

1. Deny any knowledge or information there-
 of sufficient to form a belief as to the allegations
 numbered "5" and "6" of said answer, except
 that they refer the Court to the Constitution of
 the United States and the Constitution of the
 State of New York and authoritative decisions
 thereunder for a delineation of the rights and
 lawful authority of citizens of that State and of
 the United States and except that they deny
 that, in bringing this proceeding, they are in any
 way interfering with or doing anything what-
 ever except furthering, the constitutional rights 213
 of all citizens of the State of New York and of
 the United States to have complete freedom of
 religion and a complete separation of Church
 and State.

2. Deny each and every allegation contained
 in paragraphs numbered "7", "8" and "9" of
 said answer, except that they refer this Court
 to the record and decisions in the cases referred
 to in paragraphs numbered "8" and "9" for a
 full and correct statement of the issues, pro-
 ceedings and decisions therein.

214 *Reply of Petitioners to Matter Set Forth in the
Answer of Intervenor, Read in Support of
Motion to Rescind Regulations and Dis-
continue Program Respecting Released
Time*

215 3. Deny each and every allegation contained
in paragraphs numbered "10", "11", "12" and
"13" of said answer, except that they admit
that they were aware, generally, of the pendency
of said proceeding entitled "*Joseph Lewis v.
Spaulding*" (referred to as the second Lewis
Case) when they commenced this proceeding in
July, 1948, that that case was thereafter decided
by Mr. Justice Ellsworth in the Supreme Court,
Albany County, that the petitioner therein, Joseph
Lewis, thereafter took an appeal from that
decision directly to the Court of Appeals of the
State of New York, and that thereafter said
appeal was withdrawn by said petitioner and that
they admit further that an application was made
by them, by an order to show cause, in that case
in the Court of Appeals for leave to file an *ami-
cus curiae* brief, which application was dismissed
by the Court of Appeals when that appeal was
withdrawn by said petitioner and except that
216 they refer the Court to the record in that case
for a full and correct delineation of the issues,
proceedings and decisions therein.

WHEREFORE, the petitioners pray for the grant-
ing of the relief requested in their petition
herein.

KENNETH W. GREENAWALT,
Attorney for Petitioner,
One Wall Street,
New York 5, New York.

(Verified by Tessim Zorach, one of the Peti-
tioners, on April 18, 1950.)

**Notice of Motion of Petitioners of Restoration
to Calendar and for Directing Trial of
Triable Issues and Other Relief**

217

**SUPREME COURT OF THE STATE OF
NEW YORK**

COUNTY OF KINGS

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that pursuant to the order made by Mr. Justice Beldock at Special Term, Part I, of this Court and entered herein on February 5, 1949, and upon the annexed affidavit of Kenneth W. Greenawalt sworn to April 6, 1950, the undersigned will restore this proceeding to the Calendar and will move this Court at a Special Term, Part I thereof, to be held in and for the County of Kings at the County Court House, Borough Hall, Brooklyn, New York, on the 17th day of April, 1950, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for the following relief: (1) directing a trial in respect of triable issues of fact raised by the pleadings and accompanying papers; (2) the hearing of any objections in point of law in relation to the pleadings; (3) argument upon the merits of petitioners' application; and (4) such other and further relief as may be just and proper.

218

219

Dated: April 6, 1950.

Yours, etc.,

**KENNETH W. GREENAWALT,
Attorney for Petitioners,
One Wall Street,
New York 5, New York.**

220 *Notice of Motion of Petitioners of Restoration to
Calendar and for Directing Trial of Triable
Issues and Other Relief*

To:

NATHANIEL L. GOLDSTEIN, Esq.,
Attorney General,

Attorney for Commissioner of Education,
State Office Building,
80 Centre Street,
New York 13, New York.

JOHN P. McGRATH, Esq.,
Corporation Counsel,

221 Attorney for the Board of Education,
Municipal Building,
New York 7, New York.

CHARLES H. TUTTLE, Esq.,

Attorney for The Greater New York
Coordinating Committee on Released
Time of Jews, Protestants and Roman
Catholics,
15 Broad Street,
New York 5, New York.

222

**Affidavit of Kenneth W. Greenawalt, Read in
Support of Petitioners' Motion of Resto-
ration, Etc.**

223

**SUPREME COURT OF THE STATE OF
NEW YORK**

COUNTY OF KINGS

[SAME TITLE]

State of New York }
County of New York } ss.:

KENNETH W. GREENAWALT, being duly sworn,
deposes and says:

224

I am the attorney for the petitioners in the
above entitled proceeding. I am entirely familiar
with the facts and prior proceedings.

This proceeding was originally commenced by
the petitioners on or about July 27, 1948 by the
service of a notice of motion dated July 23, 1948,
and the petition annexed thereto of the peti-
tioners Tessim Zorach and Esta Gluck verified
July 23, 1948. The motion and proceeding were
originally returnable at a Special Term, Part I,
of the Supreme Court, Kings County, on August
4, 1948.

225

The proceeding was brought under Article 78
of the Civil Practice Act for an order directing
the Board of Education of the City of New York
and the Commissioner of Education of the State
of New York to discontinue certain school prac-
tices known as the "released time program" in
the New York public schools and especially in
public schools Nos. 8 and 130 in Brooklyn, New
York, and to rescind and abrogate their regula-
tions authorizing and respecting such released
time program.

226

*Affidavit of Kenneth W. Greenawalt, Read in
Support of Petitioners' Motion of
Restoration, Etc.*

227

On said return day, August 4, 1948, the Commissioner of Education of the State of New York, pursuant to a "notice of objection on point of law" dated July 29, 1948, made a motion to dismiss the petition in so far as it is addressed to and seeks an order directed against the respondent Commissioner of Education on the ground that the Supreme Court, Kings County, to that extent, is without jurisdiction to entertain this proceeding, or in the alternative, to have the proceeding transferred to the Supreme Court, Albany County. That motion was heard by Mr. Justice Beldock who was sitting at Special Term, Part I, on said original return day. Thereafter, by a decision published in the New York Law Journal on December 30, 1948, and by an order entered February 5, 1949, Mr. Justice Beldock denied that motion.

228

Thereafter the Commissioner of Education, by permission, appealed to the Appellate Division, Second Department, from that order. By a unanimous decision rendered April 4, 1949, the Appellate Division affirmed the order of Mr. Justice Beldock (see 275 App. Div. 774).

Thereafter, by permission, the Commissioner of Education appealed to the Court of Appeals. On or about December 29, 1949, the Court of Appeals unanimously affirmed the order of the Appellate Division dated April 4, 1949, and certified that the order of Mr. Justice Beldock entered at Special Term on February 5, 1949, was properly made.

An "order on remittitur" from the Court of Appeals was made in the Appellate Division, Second Department, on January 30, 1950, and

*Affidavit of Kenneth W. Greenawalt, Read in
Support of Petitioners' Motion of
Restoration, Etc.*

229

said remittitur was duly filed in the Supreme Court, Kings County, on March 1, 1950.

Neither respondent Board of Education nor respondent Commissioner of Education served an answer to the petition upon the original return day. The time of each to serve such an answer was extended by court orders until ten days after the determination of said appeal by the Court of Appeals. Pending said appeals, the proceedings in this proceeding were stayed.

230

On or about January 10, 1950, the respondent Commissioner of Education served an answer to the petition verified January 9, 1950, annexed to which were affidavits or accompanying papers.

On or about January 9, 1950, respondent Board of Education served an answer to the petition verified January 6, 1950, annexed to which were certain affidavits or accompanying papers.

During the pendency of said appeals and on or about May 12, 1949, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics made an application for leave to intervene in this proceeding, which application was granted by a decision published in the New York Law Journal on June 16, 1949, and by an order entered herein on June 20, 1949.

231

On or about June 24, 1949, said intervenor served an answer to the petition verified June 24, 1949.

In Mr. Justice Beldock's order entered February 5, 1949, it was provided that the petitioners would be entitled to restore this matter at Special Term on at least five days' notice for

232

*Affidavit of Kenneth W. Greenawalt, Read in
Support of Petitioners' Motion of
Restoration, Etc.*

the purpose of a hearing or trial in respect of any contested issues of fact which might be raised by the answers and for the purpose of a hearing upon the merits of their original application.

By their answers the two respondents and the intervenor have raised triable issues of fact.

233

Now, in accordance with the prior proceedings, and the provisions of Article 78 of the Civil Practice Act, the petitioners are renewing their original motion and restoring the matter for the appropriate hearing or trial, or both.

KENNETH W. GREENAWALT

(Sworn to April 6, 1950.)

234

**Notice of Motion of Intervenor-Respondent,
The Greater New York Coordinating
Committee on Released Time of Jews,
Protestants and Roman Catholics, For
Final Order Dismissing Proceedings**

235

**SUPREME COURT OF THE STATE OF
NEW YORK**

COUNTY OF KINGS

[SAME TITLE]

SIRS:

236

PLEASE TAKE NOTICE that, on the petition, the answers of all the respondents, the affidavits accompanying the same, and the proceedings heretofore had herein, the Intervenor-Respondent will move this Court at a Special Term, Part I thereof, to be held in and for the County of Kings at the Municipal Building, Room 1100-H, Joralemon Street, Brooklyn, New York on April 17, 1950, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order granting the following relief:

1. Determining that the Intervenor-Respondent is entitled to a final order dismissing the proceedings on the merits in that the petition fails to state facts sufficient to constitute a cause of action, and in that such respondent is so entitled on the pleadings.

237

238 *Notice of Motion of Intervenor-Respondent, The
Greater New York Coordinating Committee
on Released Time of Jews, Protestants
and Roman Catholics, for Final Order
Dismissing Proceedings*

2. Granting such further relief as may be
just.

Dated, New York, N. Y., April 10, 1950.

Yours, etc.,

CHARLES H. TUTTLE,

Attorney for The Greater New York
Coordinating Committee on Released
Time of Jews, Protestants and Roman
Catholics, Intervenor-Respondent,

Office and P. O. Address:

15 Broad Street
New York 5, N. Y.

To:

KENNETH W. GREENAWALT, Esq.

Attorney for Petitioners

1 Wall Street

New York 5, N. Y.

240

NATHANIEL L. GOLDSTEIN, Esq.

Attorney General of the State of New York

Attorney for Respondent Commissioner

of Education of the State of New York

The Capitol

Albany 1, New York

JOHN P. McGRATH, Esq.

Corporation Counsel of the City of New York

Attorney for Respondent Board of Educa-
tion of the City of New York

Municipal Building

New York 7, N. Y.

Opinion of DiGiovanna, J.

241

(NEW YORK LAW JOURNAL)

June 20, 1950

ZORACH V. CLAUSON

By MR. JUSTICE DIGIOVANNA.

Matter of Zorach et al. (Clauson, Jr., et al.)—
This is an application pursuant to article 78 of
the Civil Practice Act for the following relief:
1. Directing a trial in respect of issues of fact
raised by the pleadings and accompanying
papers; 2. The hearing of any objections in
point of law in relation to the pleadings; 3. Argu-
ment upon the merits of petitioners' application,
and 4. Such other and further relief as may be
just and proper.

242

The petitioners allege that they are citizens,
taxpayers and parents of children attending pub-
lic elementary schools in the Borough of Brook-
lyn, City of New York. The respondents are the
Board of Education of the City of New York,
the Commissioner of Education of the State of
New York, and The Greater New York Co-ordi-
nating Committee on Released Time of Jews,
Protestants and Roman Catholics, as intervenor
respondent.

243

The objective sought by this proceeding is to
review the determination of the Board of Educa-
tion of the City of New York and the State Com-
missioner of Education in establishing what is
commonly known as the "released time pro-
gram" of religious instruction now in practice in
the public schools of this city and elsewhere
throughout this state with the ultimate aim of
compelling the discontinuance of this program.
Varying practices having developed in "released
time programs," in order to insure uniformity
and legality, the Legislature of the State of New

York enacted chapter 305 of the Laws of 1940, amending Education Law 625 (now Education Law, sec. 3210) by adding thereto the following sentence: "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

It is enlightening to quote, at this point the memorandum handed down by Governor Lehman when he signed this bill, which reads as follows: "Under this bill the State Commissioner of Education shall establish rules under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education. For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: 'Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agent of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules. A few people have given

voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

To effectuate this legislation, the State Commissioner of Education on July 4, 1940, issued the following regulations which, as amended, are "1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil. 2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies. 3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities. 4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week. 5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities. 6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Thereafter, on November 13, 1940, the Board of Education of the City of New York promulgated the following rules and regulations which are presently in full force and effect: "1. A program for religious instruction may be initiated

250

Opinion of DiGiovanna, J.

251

252

by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program. 2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose. Religious organizations, in co-operation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor. 4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough. 5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals. 6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Since the release of any child for one hour a

week for religious instruction is at the option of the parents of the child, the parent who desires to have his or her child so released is required to fill out a card, the form of which is as follows:

"Registration For Released Time Religious Instruction. New York City. 194 ..

To Principal of

..... (School). Please excuse

my child, of grade

..... one hour weekly on

..... throughout the rest of this

school year, beginning to

go for religious instruction at

..... (Name of Center to which

child is to go). (a)

(Signature of parent or guardian). Address

..... Phone

..... (b) Provision has been made

to accommodate and instruct this pupil.

..... (Signature of Clergy-

man). (Card to be retained and filed by the

Public School). RS-1."

Such registration cards are prepared and distributed either by the intervenor-respondent, an organization wholly independent of the school system, or by a particular religious organization. No member or employee of either of the other respondents participates in any way in the distribution of the cards, the distribution taking place entirely outside of school premises. No expense of this program is borne directly or indirectly by either of the other respondents. When the card has been filed in the school by the parent and the principal has notified the

teacher that the pupil shall be released at 2 P.M. on the designated day for religious instruction then, without further announcement by the teacher, the child may leave the class and school grounds at the designated time and proceed immediately to the location specified on the card for religious instruction.

Education is a process for the mental, physical and moral development of human beings. Throughout history, man has sought some form of religious worship as an influence toward his moral development. The fundamental idea of a Supreme Being requiring worship has become imbedded in the mind of man. The idea of worship in varying forms has prevailed in the minds and hearts of man throughout the ages. Formal religions too numerous and antithetical to be reconcilable, have arisen and flourished; their followers even became mortal enemies because of discord created by diversity of religious beliefs.

When the founding fathers of this country set about their task of adopting an organic law for this new nation, they did not deny the value of religion, but wisely determined that all creeds could live together more harmoniously if no creed was given preference. Therefore, in this country there has been developed a formal separation of church and state, which does not deny the value of any formal religion, but is per se, a guarantee of freedom of worship.

Recognition of the value of religious instruction as an educational contribution to the moral development of man began to take definite shape in this jurisdiction about a quarter of a century ago and has developed into the "released time program." What more logical advance could

be made in the science of sociology than the unification of religious leaders in a coordinated effort to teach children faith and morality—and for that purpose to excuse them from schools for one hour a week to go to the church or tabernacle or synagogue of their parents' choice?" (*Gordon v. Board of Education*, 78 Cal., App. Reports [2d Series], 464, 474).

The petitioners labor under the same misconception as did the petitioners in the case quoted immediately above and their concepts were criticized and rejected in the following language: 260

"Throughout her entire argument, appellant misconceives the American principle of religious freedom. What she contends for is freedom from religion rather than freedom of religion. Appellants' argument leads one to the conclusion that the doctrine of separation of church and state looks upon religion as something intrinsically evil, and against which there should be a rigid quarantine. Nothing is farther from the true concept of the American philosophy of government than such an argument. In the constitution of every state of the union is to be found language which either directly, or by clear implication, recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the wellbeing of the community" (*Gordon v. Board of Education of the City of Los Angeles*, *supra*, p. 476). The lines immediately following cite the preamble to the Constitution of the State of California which is almost exactly the wording of the preamble to the Constitution of the State of New York, which latter reads as follows: "We, the People of the State of New York, grateful to Almighty God for 261

our Freedom, in order to secure its blessings, Do Establish This Constitution."

It is in recognition of this principle that separation of church and state has never meant freedom from religion but rather freedom of religion.

To permit restraint upon state and local educational agencies which are lawfully authorized to grant released time to our young citizens who wish to take religious instruction would constitute a suppression of this right "of" religious freedom. It is tantamount to a denial of a basic right guaranteed by the letter and the spirit of our American concept of government. It would be a step in the direction of and be consonant with totalitarian and communistic philosophies existing in jurisdictions wherein atheism and the suppression of all religions are preferred to the freedom of the individual to seek religious instruction and worship. Such would be the result or conclusion if the relief sought herein by the petitioners was to be granted.

"Released time programs" have been the subjects of judicial review in many jurisdictions within this country for two and one-half decades. Among the first of these cases was involved the test of a plan used in White Plains, New York, which seems to have been identical with that here attacked. That plan was held constitutional in the Supreme Court at Special Term, in the Appellate Division and in the Court of Appeals without a single dissent: "Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. As a matter of educational policy, the Commissioner doubtless may make proper regulations to

restrict the local authorities when the administration of the plan of week-day instruction in religion or any plan of outside instruction in lay subjects in his judgment interferes unduly with the regular work of the school" (People ex rel. Lewis v. Graves, 245 N. Y., 195, 198).

Subsequent to the decision of the Supreme Court of the United States in *McCullum v. Board of Education* (333 U. S. 203) another proceeding under article 78, C. P. A., was initiated in an attack upon this program (Matter of Lewis v. Spalding, 193 Misc. 66, appeal withdrawn 299 N. Y. 564). In that proceeding the relief sought was (1) to discontinue the practice of releasing children from regular school attendance, permitting them to receive religious instruction, (2) to discontinue the existing rules or regulations providing therefor, and (3) restraining the adoption of such rules or regulations in the future. The demands therein sought a peremptory order, which was denied; in the instant case, there is in effect a restatement of demands calculated to raise issues of fact. The paramount legal question in the aforesaid case, namely, the constitutionality of the statute and regulations, having been determined adversely to the petitioner therein, a similar determination must be reached herein.

266

267

The program in operation in the City and State of New York is radically dissimilar from the Champaign Plan, which the United States Supreme Court, in the *McCullum* case, declared to be unconstitutional: the differences may be illustrated best by setting in apposition distinctive features of both.

Champaign Plan

1. No underlying enabling State statute.

269

2. Religious training took place in the school buildings and on school property.
3. The place for instruction was designated by school officials.

270

4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils.
5. School officials supervised and approved the religious teacher.

New York City Plan

1. Education Law §3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish".
2. Religious training takes place outside of the school building and off school property.
3. The place for instruction is designated by the religious organization in cooperation with the parent.
4. No element of segregation is present.
5. No supervision or approval of religious teachers or course of instruction by school officials.

Champaign Plan

6. Pupils were solicited in school buildings for religious instruction.
7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds.
8. Non-attending pupils isolated or removed to another room.

New York City Plan

6. School officials do not solicit or recruit pupils for religious instruction.
7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved.
8. Non-attending pupils stay in their regular classrooms continuing significant educational work.
9. No credit given for attendance at the religious classes.
10. No compulsion by school authorities with respect to attendance or truancy.
11. No promotion or publicizing of the released time program by school officials.
12. No public moneys are used.

272

273

Section 3210 of the Education Law, as implemented by the respective regulations of the state commissioner and the board of education, is objected to by the petitioners herein as unconstitutional. In *Everson v. Board of Education* (330

U. S., 1, 16) we are reminded: " . . . we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power." In the same case (pp. 15-16) it is stated that: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

The recent and much-quoted decision of the Supreme Court of the United States in *McColum v. Board of Education* (supra), which declared unconstitutional the so-called Champaign Plan, was arrived at on the facts of that case. In so doing, Mr. Justice Frankfurter expressly stated (p. 226): "The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied."

And, again (p. 227), the same justice said: "Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects."

In the very opinion holding the Champaign Plan unconstitutional, Mr. Justice Frankfurter further said (p. 230): "If that were all, Champaign might have drawn upon the French system, known in its American manifestation as 'dismissed time,' whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school."

278

As a further indication that the plan before this court is consistent with this judicial reasoning, the same court said (p. 231): "We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program. We find that the basic Constitutional principle of absolute Separation was violated when the State of Illinois, speaking through its Supreme Court

279

sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement."

In discussing the objection that a child whose parents do not choose for him any form of religious instruction may be classed as a dissenter and thereby humiliated, Mr. Justice Jackson, in his concurring opinion, said in the same case (p. 233): "Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends non-conformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground."

Coinciding with the views of Mr. Justice Frankfurter, Mr. Justice Jackson in the same case continued (p. 237): "The opinions in this case show that public educational authorities have evolved a considerable variety of practices in dealing with the religious problem. Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error." In what amounts to a summation of the entire proposition involving voluntary re-

religious instruction, in the same opinion, Mr. Justice Jackson said (p. 235): "To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits."

284.

A careful analysis of the McCollum case leads this court to hold that the present "released time" program contains none of the objectionable features of the plan in that case which was the basis of the decision in the Supreme Court of the United States holding the plan to be unconstitutional. The subsequent decision of the courts in this state in *Matter of Lewis v. Spalding* (supra) is clearly determinative of the constitutionality of the plan under attack.

285

The petitioners have, in this proceeding adopted a different prayer for relief from that sought in *Matter of Lewis v. Spalding* (supra). While

continuing to attack the constitutionality of the statute and regulations involved, they seek a direction for discontinuance of the regulations on a generalized allegation of maladministration in particular instances, of which no particulars are cited.

However, the practice or practices which may grow up in the matter of administrative details do not affect the constitutionality of the statute involved, for the statute must stand or fall by itself on this question.

The attorney for the petitioners, in his memorandum relative to the merits of the petitioner's application and the legal sufficiency of the petition says (p. 9): "It is submitted that it is not the details of a particular released time program which render it violative of the First Amendment; it is the basic concept—the *raison d'être* of the program, which causes it to run afoul of the Amendment as interpreted in the *Everson* and *McCullum* decisions." However, the majority opinions of Mr. Justice Frankfurter and Mr. Justice Jackson quoted above seem to directly negate this assertion.

In the face of a holding that the statute attacked is constitutional, we next come to the question of whether triable issues are presented. What are the issues raised by this proceeding other than the question of constitutionality? There are no degrees of constitutionality. Neither does compliance with the statute render it constitutional if it is unconstitutional, nor does administrative error render it unconstitutional if it is constitutional. It may be, conceivably, that in isolated cases a particular teacher will

fail to conform to the regulatory mandates imposed by the respondents, but if such be the case, the remedy is not the invalidation of a valid statute but the imposition of a disciplinary penalty upon the violator. To prevent or redress particular instances of maladministration, ample machinery of law exists. However, that is not an issue in this special proceeding because no record has been presented of an arbitrary or capricious ruling by the respondents respecting any particular act of maladministration. This court cannot agree, therefore, with the argument of counsel for the petitioners that it has before it the question of whether or not the program is being conducted in accordance with the regulations. Indeed, there is no proof that it is not while there is proof, immaterial to this special proceeding, that it is being so conducted in the particular schools attended by the children of these petitioners. In fact the attorney for the petitioners, in the citation from his brief above quoted, concedes that fact. The question validly presented by this proceeding is solely addressed to the constitutionality of the statute and regulations.

290

291

Previous motions made and determined by other justices of this court have been in no sense determinative of the issues raised in this proceeding. Mr. Justice Beldock, and the Appellate Division (275 App. Div. 774) distinctly stated that their respective decisions determined only the proper venue. Similarly, neither Mr. Justice Walsh (195 Misc., 531, 534), nor Mr. Justice Hearn made any determination that the petition was immune from attack at this time. As a mat-

ter of fact, The Greater New York Co-ordinating Committee only became a party to this proceeding by permission of Mr. Justice Walsh and the cross-motion of the said intervenor in this proceeding must be considered timely.

From the above, it follows that the first prayer for relief of the petitioners, namely, that a trial be directed of the respective issues of fact raised by the pleadings and accompanying papers, must be denied because no issues exist. The second prayer for the hearing of objections in point of law in relation to the pleadings, has been disposed of by way of lengthy oral argument before this court and submission of voluminous briefs by all the interested parties. The third prayer, that argument be had on the merits of petitioners' application, has been disposed of in the same manner. The court finds that assuming all of the facts set forth in the petition are deemed to be true, nothing has been shown to warrant a finding that section 3210 of the Education Law is unconstitutional or that the regulations adopted by the respondents as required by section 3210, are arbitrary or capricious or unreasonable in law or in fact.

The cross-motion of the intervenor-respondent, is granted. The objections of all respondents in point of law to the petition are sustained and the petition is dismissed on the merits as a matter of law.

Submit final order.

Stipulation Waiving Certification

295

IT IS HEREBY STIPULATED, pursuant to Section 170 of the Civil Practice Act, that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from, the opinion and all the papers upon which the Court below acted in making said order and opinion, and the whole thereof, now on file in the office of the Clerk of the County of Kings, and certification thereof pursuant to Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated the day of October, 1950.

296

KENNETH W. GREENAWALT,
Attorney for Petitioners-Appellants.


JOHN P. McGRATH,
Corporation Counsel,
Attorney for Respondent,
Board of Education of the
City of New York.

NATHANIEL L. GOLDSTEIN,
Attorney General,
Attorney for Respondent,
Commissioner of Education of
the State of New York.

297

CHARLES H. TUTTLE,
Attorney for Intervenor-Respondent,
Coordinating Committee on Released
Time of Jews, Protestants and Roman
Catholics.

**ADDITIONAL PAPERS ON APPEAL TO
THE COURT OF APPEALS**

(See Opposite) 

**Notice of Appeal to Court of Appeals;
SUPREME COURT OF THE STATE OF
NEW YORK
COUNTY OF KINGS**

301

In the Matter of the Application of
TESSIM ZORACH and ESTA GLUCK,
Petitioners-Appellants,
for an order pursuant to Article 78 of the
Civil Practice Act,
against

302

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE
A. TIMONE, and JAMES MARSHALL, constituting
the Board of Education of the City of New York,
and FRANCIS T. SPAULDING, Commissioner of
Education of the State of New York,
Respondents,

directing them to discontinue certain
school practices,
and

THE GREATER NEW YORK COORDINATING COM-
MITTEE ON RELEASED TIME OF JEWS, PROTESTANTS
AND ROMAN CATHOLICS,

Intervenor-Respondent.

303

SIRS:

PLEASE TAKE NOTICE that the petitioners above
named hereby appeal to the Court of Appeals of
the State of New York from the order made in
the Appellate Division, Supreme Court, Second
Judicial Department, and entered in the office of
the Clerk of said Appellate Division on the 15th
day of January, 1951, which said order, two Jus-
tices dissenting, affirmed a final order of the
Supreme Court, Kings County, in the above-

304

Notice of Appeal to the Court of Appeals

entitled proceeding, entered in the office of the Clerk of the County of Kings on or about the 24th day of June, 1950; and the petitioners appeal from each and every part of said order and from the whole thereof.

Dated New York, N. Y., March 13, 1951.

Yours, etc.,

KENNETH W. GREENAWALT,

Attorney for Petitioners,

One Wall Street,

New York 5, New York.

305

To:

HON. FRANCIS J. SINNOTT,

County Clerk of Kings County,

Hall of Records,

Brooklyn, New York.

HON. JOHN P. McGRATH,

Corporation Counsel of the City of New

York, Attorney for Respondent, Board

of Education of the City of New York,

Municipal Building,

New York, New York.

306

HON. NATHANIEL L. GOLDSTEIN,

Attorney General,

Attorney for Respondent, Commis-

sioner of Education of the State of

New York,

80 Centre Street,

New York, New York.

CHARLES H. TUTTLE, Esq.,

Attorney for Intervenor-Respondent,

The Greater New York Coordinating

Committee on Released Time of Jews,

Protestants and Roman Catholics,

15 Broad Street,

New York, New York.

Order of Affirmance of Appellate Division

307

At a term of the Appellate Division
of the Supreme Court of the
State of New York held in and
for the Second Judicial Depart-
ment at the Borough of Brook-
lyn, on the 15th day of January,
1951.

Present—Hon. GERALD NOLAN,

Presiding Justice,

“ WILLIAM B. CARSWELL,

“ FRANK F. ADEL,

“ CHARLES W. U. SNEED,

“ HENRY G. WENZEL, JR., Justices.

308

In the Matter of the Application of
TESSIM ZORACH and ESTA GLUCK,
Petitioners-Appellants,
for an order pursuant to Article 78 of the
Civil Practice Act,
against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE
A. TIMONE, and JAMES MARSHALL, constituting
the Board of Education of the City of New York,
and FRANCIS T. SPAULDING, Commissioner of
Education of the State of New York,

309

Respondents,

directing them to discontinue certain
school practices,

and

THE GREATER NEW YORK COORDINATING COM-
MITTEE ON RELEASED TIME OF JEWS, PROTESTANTS
AND ROMAN CATHOLICS,

Intervenor-Respondent.

ORDER ON APPEAL FROM FINAL ORDER

The above named Tessim Zorach and Esta
Gluck, the petitioners in this proceeding having

310 *Order of Affirmance of Appellate Division*

appealed to the Appellate Division of the Supreme Court from a final order of the Supreme Court dated June 23rd, 1950, and entered in the office of the Clerk of the County of Kings on June 24th, 1950, denying petitioners' motion for an order directing a trial in respect to issues of fact; granting the cross-motion of the intervenor-respondent for a final order dismissing the proceedings on the merits on the ground that the petition failed to state facts sufficient to constitute a cause of action; sustaining the objections of respondents in point of law to the petition; and denying petitioners' application in all respects and dismissing their petition on the merits as a matter of law, herein, and the said appeal having been argued by Mr. Kenneth W. Greenawalt of Counsel for petitioners-appellants, and argued by Messrs. Charles H. Tuttle and Porter R. Chandler of Counsel for intervenor-respondent, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, and argued by Mr. Michael A. Castaldi, Assistant Corporation Counsel, of Counsel for respondents constituting the Board of Education of the City of New York, and argued by Mr. John P. Powers, Assistant Attorney General, of Counsel for respondent Commissioner of Education of the State of New York, and submitted by Messrs. Theodore Leskes, Will Maslow and Arnold Forster for the American Jewish Committee, the American Jewish Congress and the Anti-Defamation League of B'Nai B'rith, as amici curiae, and submitted by Mr. Frank E. Karelsen, Jr. of Counsel for Public Education Association, as amicus curiae, and submitted by Mr. R. Lawrence Siegel of Counsel

311

312

Order of Affirmance of Appellate Division

313

for Committee on Academic Freedom of the American Civil Liberties Union and the New York City Civil Liberties Committee, as amici curiae, and submitted by Mr. Norman Salit of Counsel for New York Board of Rabbis, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed;

It is Ordered that the final order so appealed from be and the same hereby is affirmed, with one bill of \$10. costs and disbursements to respondents and intervenor-respondent. Noland, P. J., Carswell and Sneed, JJ., concur; Adel and Wenzel, JJ., dissent and vote to reverse the order and to grant the motion of petitioners for the relief demanded in the petition. 314

Enter:

JOHN J. CALLAHAN
Clerk.

315

316

Order of Affirmance of Appellate Division

NOTICE OF ENTRY

PLEASE TAKE NOTICE, that an order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the 2nd Judicial Department on the 15th day of January, 1951, and a certified copy of said order was duly filed in the office of the Clerk of the County of Kings on the 30th day of January, 1951.

317

Yours, etc.,

JOHN P. McGRATH,
Corporation Counsel,
Attorney for Bd. of Educ.
Municipal Building,
Borough of Manhattan,
New York City.

To

318

KENNETH W. GREENAWALT, Esq.
Attorney for Petit.-Appls.
One Wall St., N. Y., N. Y.

NATHANIEL L. GOLDSTEIN, Esq.,
Attorney General
Attorney for Resp.
Comm. of Educ.
80 Centre St.,
N. Y., N. Y.

CHARLES H. TUTTLE, Esq.
Attorney for Interv.-Resp.
The Greater N. Y. Coordinating Committee, etc.
15 Broad St.,
N. Y., N. Y.

Opinion of Appellate Division

(278 App. Div. 573)

By NOLAN, P.J.; CARSWELL, ADEL, SNEED
AND WENZEL, JJ.

319

Matter of Zorach and ano., pet-ap (Clauson, Jr., &c., res)—In a proceeding pursuant to article 78 of the Civil Practice Act, petitioners appeal from a final order dated June 23, 1950, which (1) denied petitioners' motion for an order directing a trial in respect to issues of fact; (2) granted the motion of the intervenor-respondent for a final order dismissing the proceedings on the merits on the ground that the petition failed to state facts sufficient to constitute a cause of action; (3) sustained the objections of respondents in point of law to the petition; and (4) denied petitioners' application in all respects and dismissed their petition on the merits as a matter of law. The purpose of the proceeding was to obtain an order, directed to respondent Board of Education and respondent Commissioner of Education, to discontinue the program of released time for religious education in practice in New York City and to rescind the regulations promulgated by both respondents respecting and authorizing such released time program.

320

Section 3210, subdivision 1-b, of the Education Law provides that absence from attendance upon instruction, as required by that statute, shall be permitted for religious observance and education, under rules that the Commissioner of Education shall establish. Pursuant to such statutory authority, respondent Spaulding, as Commissioner of Education, established the following regulations: "1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in

321

writing signed by the parent or guardian of the pupil. 2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies. 3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities. 4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week. 5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities. 6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Thereafter, respondent Board of Education, purporting to act in accordance with the regulations adopted by the Commissioner of Education, established the following regulations: "1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program. 2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be

filed in the office of the public school as a record of pupils, entitled to be excused, and will not be available or used for any other purpose. 3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor. 4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough. 5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals. 6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

326

Petitioners contended, for reasons set forth in their petition, that the regulations so established and the operation thereunder of the "released time program" in New York City, pursuant thereto, prohibited the free exercise of religion in violation of the First and Fourteenth Amendments of the United States Constitution, and section 3, article 1 of the Constitution of the State of New York, and that section 3210 of the Education Law, if construed to authorize the establishment of such regulations and the operation of the released time program thereunder as described in their petition, was also unconstitu-

327

tional as violative of the First and Fourteenth Amendments of the United States Constitution.

Order affirmed, with one bill of \$10 costs and disbursements to respondents and intervenor-respondent.

329

Subdivision 1-b of section 3210 of the Education Law, which merely provides that absence from attendance on required instruction shall be permitted for the specified religious purposes under rules to be established, is in no way unconstitutional. Moreover, if the truth of all of the well pleaded allegations of the petition is conceded, petitioners have failed to allege facts sufficient to establish any invasion of their constitutional rights by the adoption of the regulations complained of, or the operation thereunder of the "released time program" (cf. *People ex rel. Lewis v. Graves*, 245 N. Y., 195; *Matter of Lewis v. Spaulding*, 193 Misc., 66). *McCollum v. Board of Education* (333 U. S., 203), which may be readily distinguished on its facts does not require a contrary determination.

330

Nolan, P.J., Carswell and Sneed, JJ., concur.

Adel, J., dissents and votes to reverse the order and to grant the motion of petitioners for the relief demanded in the petition, with the following memorandum: The program described in the regulations adopted under section 3210, subdivision 1-b, of the Education Law, and which admittedly is in operation in New York City, is in violation of the constitutional requirement for separation of church and state (*McCollum v. Board of Education*, 333 U. S., 203).

The elements of the program operated in Champaign, Ill., are factually different from those in the New York City program, in suit, but

the difference in facts requires no different holding. The New York City program is void in that it is integrated with the state's compulsory education system, which assists the program of religious instruction carried on by separate religious sects; in that it releases pupils, who are compelled to attend public schools for secular education, from part of their legal duty upon condition that they attend religious classes; and in that the state's compulsory public school machinery is used to afford aid and assistance to sectarian groups by helping provide pupils for religious classes. Wenzel, J., concurs with Adel, J.

334

Stipulation Waiving Certification of Record to the Court of Appeals

335

IT IS HEREBY STIPULATED, pursuant to Section 170 of the Civil Practice Act, that the foregoing consists of true and correct copies of the notice of appeal to the Court of Appeals, the order of affirmance of Appellate Division appealed from, the opinion of Appellate Division and all the papers upon which the Court below acted in making said order, and the whole thereof, now on file in the office of the Clerk of the County of Kings; and certification thereof pursuant to Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated the day of April, 1951.

KENNETH W. GREENAWALT,
Attorney for Petitioners-Appellants.

JOHN P. McGRATH,
Corporation Counsel,
Attorney for Respondent,
Board of Education of the
City of New York.

336

NATHANIEL L. GOLDSTEIN,
Attorney General,
Attorney for Respondent,
Commissioner of Education of
the State of New York.

CHARLES H. TUTTLE,
Attorney for Intervenor-Respondent,
Coordinating Committee on Released
Time of Jews, Protestants and Roman
Catholics.

[fols. 113-114] IN COURT OF APPEALS, STATE OF NEW YORK

In the Matter of TESSIM ZORACH et al., Appellants, against
ANDREW G. CLAUSON, JR., et al., Constituting the Board of
Education of the City of New York, et al., Respondents,
and GREATER NEW YORK COORDINATING COMMITTEE ON RE-
LEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,
Intervener, Respondent.

OPINION—Argued May 31, 1951; decided July 11, 1951

FROESSEL, J. This appeal challenges the constitutionality of the long-standing "released time" program in New York City, whereby parents may withdraw their children from the public schools one hour a week to receive religious instruction in the faith of their acceptance.

For many years released time existed in this State without express statutory authority. Then in 1940, the State Legislature, by an almost unanimous vote and with the approval of Governor Lehman (1940 Public Papers of Governor Lehman, p. 328), added (L. 1940, ch. 305) to the Education Law, which governs, among other things, the attendance of minors in schools, the following provision: "Absence for religious observance and education shall be permitted under rules that the commissioner [of education] shall establish."

Pursuant to this provision, which is now found in paragraph b of subdivision 1 of section 3210 of the Education Law, the State Commissioner of Education has promulgated the following rules (Regulations of Comr. of Educ., art. 17, § 154; 1 N. Y. Official Compilation of Codes, Rules and Regulations, p. 683):

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.

"3: Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

[fol. 115] "4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Additional rules have been established by the New York City Board of Education:

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

"2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

"3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough.

"5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

[fol. 116] "6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Appellants, parents of children attending public schools in New York City who do not avail themselves of this program and are in no wise obliged to do so, challenge by this article 78 proceeding the constitutionality of the foregoing statute and rules *in toto*, upon the ground that they violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Federal Constitution, as applied to the States by the Fourteenth Amendment, and prohibit the free exercise of religion in violation of the First and Fourteenth Amendments of the Federal Constitution and section 2 of article I of our State Constitution. The courts below have denied them relief and dismissed the proceeding.

In support of their contention, appellants rely primarily on *Illinois ex rel. McCollum v. Board of Educ.* (333 U. S. 203). There, a local board of education in Champaign County, Illinois, participated in a released time program which differed radically from the one before us. There was no underlying State enabling act. Religious training took place in the school buildings and on school property. The place for instruction was designated by the school authorities. Pupils taking religious instruction were segregated by school authorities according to faiths. School officials supervised and approved the religious teachers. Pupils were solicited in school buildings for religious instruction. Registration cards were distributed by the school, and in one case printed by the school. None of these factors is present in the case before us, and, accordingly, the Supreme Court's holding that the Champaign released time program was constitutionally invalid is not controlling here.

In the New York City program there is neither supervision nor approval of religious teachers and no solicitation of pupils or distribution of cards. The religious instruction must be outside the school building and grounds. There

must be no announcement of any kind in the public schools relative to the program and no comment by any principal or teacher on the attendance or nonattendance of any pupil upon religious instruction. All that the school does besides [fol. 117] excusing the pupil is to keep a record—which is not available for any other purpose—in order to see that the excuses are not taken advantage of and the school deceived, which is, of course, the same procedure the school would take in respect of absence for any other reason.

It is manifest that the *McCollum* case (*supra*) is not a holding that all released time programs are *per se* unconstitutional. The Supreme Court's decision is limited to the fact situation before it. Thus, Mr. Justice Black, writing for the court, reviewed the evidence so far as undisputed and stated (p. 209) that the foregoing "facts" (emphasis supplied) "show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education."

In the instant case, there is no "use" of tax-supported "property or credit or any public money" "directly or indirectly" "in aid or maintenance" of religious instruction (*People ex rel. Lewis v. Graves*, 245 N. Y. 195, 198, motion for reargument denied 245 N. Y. 620, affg. 219 App. Div. 233, affg. 127 Misc. 135), and there is no such co-operation as in the *McCollum* case (*supra*) between the school authorities and the religious committee in promoting religious education.

Other Justices who wrote in the *McCollum* case (*supra*) were even more explicit in placing boundaries on the determination. Mr. Justice Frankfurter, in a concurring opinion in which three other Justices joined, stated:

"Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication." (P. 225.)

"The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does 'released time' operate in Champaign?" (P. 226.)

"We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty [fol. 118] years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable." (P. 231.)

Mr. Justice Jackson, in addition to agreeing with the limitations expressed by Mr. Justice Frankfurter, added reservations of his own, and stated: "we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain" (p. 232), and that "it is important that we circumscribe our decision with some care." (P. 234.)

Mr. Justice Reed, who dissented from the court's holding, pointed out (pp. 239-240) that expressions in the opinions of his colleagues "seem to leave open for further litigation variations from the Champaign plan." Thus, in addition to the reference in the court's opinion to the "foregoing facts" of the Champaign plan as showing its unconstitutionality, we have five other Justices expressly agreeing that released time as such is not unconstitutional.

Binding precedent must therefore be found in our own decision of nearly twenty-five years ago in *People ex rel. Lewis v. Graves* (*supra*), which involved a released time program in the city of White Plains. Such program, except for the absence of a State enabling act, was substantially the same as the one now in issue. Judge Pound, writing for a unanimous court, its other distinguished members having been Chief Judge Cardozo, and Judges Crane, Andrews, Lehman, Kellogg and O'Brien, there said (p. 198, 199):

"A child otherwise regular in attendance may be excused for a portion of the entire time during which the schools are in session, to the extent at least of half an hour in each week, to take outside instruction in music or dancing without violating the provisions of the Compulsory Education Law, either in letter or spirit. Otherwise the word 'regularly' as used in the statute would be superfluous. Practical administration of the public schools calls for some elasticity in this regard and vests some discretion in the school authori-

ties. Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. . . .

[fol. 119] "The separation of the public school system from religious denominational instruction is thus complete. Jealous sectaries may view with alarm the introduction in the schools of religious teaching which to the unobservant eye is but faintly tinted with denominationalism. Eternal vigilance is the price of constitutional rights. But it is impossible to say, as matter of law, that the slightest infringement of constitutional right or abuse of statutory requirement has been shown in this case."

To like effect are *Gordon v. Board of Educ. of City of Los Angeles* (78 Cal. App. 2d 464, review denied 78 Cal. App. 2d 481) and *Matter of Lewis v. Spaulding* (193 Misc. 66, appeal withdrawn 299 N. Y. 564).

Two years before our decision in the first *Lewis* case, it had been "assumed" by the Supreme Court that freedom of speech and of the press, likewise guaranteed by the First Amendment, were protected by the due process clause of the Fourteenth Amendment (*Gitlow v. New York*, 268 U. S. 652, 666), and, while the appellant in the *Lewis* case laid greater stress on section 4 of article IX (now art. XI, § 4) of the New York Constitution, he expressly urged in his petition the violation "of the constitutional guarantees of the New York State and the United States Constitutions respecting religious liberty and the separation of church and state". Nevertheless we held that the released time program did not breach the so-called "wall of separation" between church and state.

No metaphorical "wall" that mere words can build ever precisely and mathematically delineates a constitutional right. The Supreme Court has recognized, in a religious freedom case that to "make accommodation between these freedoms" guaranteed by the First Amendment and "an exercise of state authority" is always "delicate" (*Prince v. Massachusetts*, 321 U. S. 158, 165). Such freedoms are not absolute (*Prince v. Massachusetts*, *supra*, p. 166; *Dennis v. United States*, 341 U. S. 494; *Breard v. Alexandria*, 341 U. S. 622; *Schenck v. United States*, 249 U. S. 47). Numerous situations involving some incidental benefit to re-

ligion have been found constitutionally unexceptionable (see, e.g., *Everson v. Board of Educ.*, 330 U. S. 1; *Cochran v. Louisiana State Bd. of Educ.*, 281 U. S. 370; *Bradfield v. [fol. 120] Roberts*, 175 U. S. 291). Tax exemption of church properties (Tax Law, § 49 subd. 6) is but another of many illustrations, and the practice is generally followed. Very recently, in upholding the Sunday law, we have recognized that separation of church and State does not mean that every State action remotely connected with religion must be outlawed (*People v. Friedman*, 302 N. Y. 75, appeal dismissed for want of a substantial Federal question, 341 U. S. 907).

It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and State shall be discountenanced. The so-called "wall of separation" may be built so high and so broad as to impair both State and church, as we have come to know them. Indeed, we should convert this "wall", which in our "religious nation" (*Church of Holy Trinity v. United States*, 143 U. S. 457, 470) is designed as a reasonable line of demarcation between friends, into an "iron curtain" as between foes, were we to strike down this sincere and most scrupulous effort of our State legislators, the elected representatives of the People, to find an accommodation between constitutional prohibitions and the right of parental control over children. In so doing we should manifest "a governmental hostility to religion" which would be "at war with our national tradition" (*Illinois ex rel. McCollum v. Board of Educ.*, *supra*, p. 211) and would disregard the basic tenet of constitutional law that "the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution" (*Atkin v. Kansas*, 191 U. S. 207, 223).

While extreme care must, of course, be exercised to protect the constitutional rights of these appellants, it must also be remembered that the First Amendment not only forbids laws "respecting an establishment of religion" but also laws "prohibiting the free exercise thereof". We must not destroy one in an effort to preserve the other. We cannot, therefore, be unmindful of the constitutional

rights of those many parents in our State (we are told that some 200,000 children are enrolled in the released time programs in this jurisdiction, and ten times as many throughout the nation) who participate in and subscribe to such programs. The right of parents to direct the rearing and education of their children, free from any general power of the State to standardize children by forcing them to accept instruction from public school teachers only, is an unquestioned one (*Pierce v. Society of Sisters*, 268 U. S. 510), and, more recently, the nation's highest judicial tribunal has declared: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder" (*Prince v. Massachusetts*, *supra*, p. 166).

Because the public school must be kept separate and apart from the church, pupils may not constitutionally receive religious instruction therein. All that New York parents ask then is that their children may be excused one hour a week for that purpose. The New York City Board of Education provides more days for secular instruction than required by law (Education Law, § 3204, subd. 4). The Education Law does not fix the number of hours that constitute a school day. Excuses from attendance are permitted for many good reasons; among others, children are excused from school on holy days set apart by their respective faiths, thus producing a most obvious form of divisiveness, not paralleled in the released time program. Indeed we are all agreed that refusal to excuse children for that reason would be an unconstitutional abridgement of freedom of religion. If it be constitutional to excuse children of a particular faith for entire days for such a religious purpose, it seems clear, by a parity of reasoning, that it is also constitutional, under the circumstances here presented, to excuse children of whatever faith one hour a week for another and similar religious purpose. The statute (Education Law, § 3210, subd. 1, par. b) authorizes absence for both "religious observance and education".

Moreover, parents have the right to educate their children elsewhere than in the public schools, provided the State's minimum requirements are met (Education Law, § 3204; *Pierce v. Society of Sisters*, *supra*), and thus, if they wish,

choose a religious or parochial school where religious instruction is freely given. That being so, it follows that parents, who desire to have their children educated in the [fol. 122] public schools but to withdraw them therefrom for the limited period of only one hour a week in order to receive religious instruction, may ask the public school for such permission, and the school may constitutionally accede to this parental request. There is nothing in the Constitution commanding that religious instruction may be given on the Sabbath alone, and on no other day.

Appellants assert that in any event triable issues of fact are presented. A basic difficulty with this contention is that appellants now declare that they are prepared to show on a trial matters that have not even been properly pleaded. A great many of their allegations are conclusory in character (*Kalmanash v. Smith*, 291 N. Y. 142, 154), and, as appellants concede, have been lifted bodily from portions of the *McCullum* opinions, without the statement of adequate facts to support them (Civ. Prac. Act, § 1288). As the Appellate Division said, "if the truth of all of the well-pleaded allegations of the petition is conceded, petitioners have failed to allege facts sufficient to establish any invasion of their constitutional rights" (emphasis supplied; 278 App. Div. 573, 575).

Moreover, many of the conclusory allegations suggest merely a disobedience of the rules and regulations. Such disobedience, while it might warrant the initiation of disciplinary proceedings against any of the offending teachers or principals, would in nowise warrant the relief prayed for, namely, a total discontinuance of the released time program and a rescission of all regulations established by the authorities. It is, of course, possible that a statute and regulations constitutional on their face may be administered in an unconstitutional way (*Snowden v. Hughes*, 321 U. S. 1; *Yick Wo v. Hopkins*, 118 U. S. 356), but in order to invoke this principle it must appear that there is "an element of intentional or purposeful discrimination" by the enforcement authorities (*Snowden v. Hughes*, *supra*, p. 8). Here there is no allegation in the petition to that effect, and, indeed, even in appellants' brief and in the briefs *amici* supporting their position, "The offer of proof

was not an offer to show a pattern of discrimination consciously practiced" (*People v. Friedman, supra*, p. 81). Under the circumstances, whether the released time program is constitutional is solely a question of law, and the [fol. 123] case has been so treated by Special Term as well as by the Appellate Division majority and dissenters.

The order of the Appellate Division should be affirmed, with costs.

LOUGHRAN, Ch. J. (concurring). I vote to affirm the order of the Appellate Division upon the authority of *People ex rel. Lewis v. Graves* (245 N. Y. 195).

DESMOND, J. (concurring). This is a mandamus-type proceeding (Civ. Prac. Act, art. 78) brought to compel the New York City Board of Education and the State Commissioner of Education, to discontinue and abolish the so-called "released time program" in the city's public schools, on the alleged ground that the release of children from those schools, for one hour a week, at the request of parents, to attend outside religious instruction in their several faiths, violates the Federal Constitution as to its First Amendment, made applicable to the States by the Fourteenth Amendment. Specifically, it is the contention of petitioners that the program as conducted in New York City, and the State statute and State and local regulations under which it operates "are violative of the U. S. Constitution within the principles set forth in the *McCullum* decision" that is, *Illinois ex rel. McCullum v. Board of Educ.* (333 U. S. 203). I vote for affirmance, because I see no basis for any claim of unconstitutionality.

The First Amendment, which is not quoted at any place in the petition or in the briefs of petitioners and their supporters, forbids the making of laws "respecting an establishment of religion, or prohibiting the free exercise thereof". Neither of those prohibitions, in language or meaning, has anything whatever to do with this released time system. The *McCullum* case (*supra*), is not controlling on us here, since the Champaign, Illinois plan, there struck down as unconstitutional, differed from the New York program in a number of important respects, principally in that religious training took place in the classrooms of the Champaign public schools (one of the "chief reasons" for the decision, says Justice JACKSON in a note in the *Kunz v. New*

York dissent, 340 U. S. 290, 311), some public funds were spent in Champaign, the religious teachers there were chosen with the approval of the public school officials, and pupils were, in the Champaign school buildings, solicited [fol. 124] for religious instruction. If we are to decide this case on precedent, we must follow our own decision in *People ex rel. Lewis v. Graves* (245 N. Y. 195), where we upheld, as against claims that it contravened both the Federal and State Constitutions, a released time plan identical with the one now before this court. It must be conceded, of course, that there are, scattered through the several lengthy opinions in *McCullum*, expressions which can be read to proscribe all released time programs, including this one. But *stare decisis* does not mean *stare verbis*, and until the New York plan, or one just like it, confronts the Supreme Court, there will be no precedent binding on us.

Before turning to a somewhat more thorough discussion of the constitutional question, I mention another separate ground for affirmance. Petitioners are, according to the petition, the parents of pupils in New York City schools where this plan operates. Their children do not take part in the program but each receives religious instructions at religious schools, outside public school hours. It is indeed difficult to see how the release of other parents' children impinges in any way at all, on any "right" of petitioners. True, they allege that the operation of the released time program "inevitably results" in coercion on parents and children to attend religious instruction, but it is clear that no such "inevitable" result has befallen petitioners or their children. The *Lewis* case (*supra*) in this court can, I suppose, be read as holding that these petitioners, as citizens, have standing to bring this mandamus proceeding, but I suggest the point will bear reinvestigation. It is far-fetched to say that petitioners are aggrieved by the continuance of a program which has no effect on them or their children, and which does not involve the use of public buildings, property or funds.

I return to the alleged constitutional question, which needs must be one under the Federal Bill of Rights, since an extramural religious education project, just like this one, was expressly held, in the *Lewis* case (*supra*), not to be interdicted by our State Constitution (art. XI, § 4). Our

duty then (unhampered by *McCollum* which is not controlling) is to lay the plain facts of this released time system over against the plain words of the First Amendment. The amendment, lavishly alluded to but seldom quoted, bans, in [fol. 125] lucid, specific words, the making of any law "respecting an establishment of religion, or prohibiting the free exercise thereof". The New York released time setup is authorized by a statute (Education Law, § 3210), which permits absences from public schools "for religious observance and education", under rules to be established by the State Commissioner. In approving its passage, Governor Lehman, whose devotion to constitutional liberties needs no encomium, characterized as groundless the fears expressed by some that it "violates principles of our government" and stated: "The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system" (1940 Public Papers of Governor Lehman, p. 328). The regulations adopted by the State Education Commissioner, and by respondent New York City board (taking both sets of regulations together) excuse the absence from school, for one hour a week at the close of a daily session, of any pupil, whose absence is requested by his parent or guardian for attendance at, and, who does attend, a religious education course conducted under the control of one or more duly constituted religious bodies, each such pupil to be registered for the religious course with, and his attendance thereat reported to, the public school authorities, no announcement of any kind relative to the program to be made in the public school, but notification to come to parents from the religious organization only, no comment to be made by any principal or teacher of attendance or nonattendance of any pupil at the religious classes, and no responsibility for attendance thereat to be assumed by the public school but solely by the religious organizations, which, co-operating with parents, must file with the public school principal weekly, a statement of attendance at, or absence from the religion classes, of any pupil enrolled in the latter, with a statement of reasons for absences therefrom. Just where in all that is there "an establishment of religion" or a prohibition of "the free exercise thereof"? Characterization of such a program as "divisive" or "oppressive" or "co-

ercise" is meaningless on a question of constitutional law. What petitioners are saying is that they dislike the whole enterprise, and consider it socially undesirable. Those are predilections, not questions of law.

[fol. 126] The basic fundamental here at hazard is not, it should be made clear, any so-called (but nonexistent, as I shall try to show) "principle" of complete separation of religion from government. Such a total separation has never existed in America, and none was ever planned or considered by the founders. The true and real principle that calls for assertion here is that of the right of parents to control the education of their children, so long as they provide them with the State-mandated minimum of secular learning, and the right of parents to raise and instruct their children in any religion chosen by the parents (*Pierce v. Society of Sisters*, 268 U. S. 510; *Meyer v. Nebraska*, 262 U. S. 390; *Packer Collegiate Inst. v. University of State of N. Y.*, 298 N. Y. 184, 192). Those are true and absolute rights under natural law, antedating, and superior to, any human constitution or statute.

I cannot believe that the Chief Justice of the United States, in his opinion for the Supreme Court majority in *Dennis v. United States* (341 U. S. 494, 508), meant, literally, what he wrote: "that there are no absolutes" and that "all concepts are relative". Of course, even the constitutional rights of freedom of speech and freedom of religion are, to a degree, nonabsolute, since their disorderly or dangerous exercise may be forbidden by law. But embodied within "freedom of religion" is a right which is absolute and not subject to any governmental interference whatever. Absolute, I insist, is the right to practice one's religion without hindrance, and that necessarily comprehends the right to teach that religion, or have it taught, to one's children. That anything in the United States Constitution means, or could ever be tortured into meaning, that our basic law is violated by an arrangement whereby parents take their own children from the common schools, for one hour a week for instruction in their religion, is beyond my comprehension. As Dean Pound has lately reminded us, our American bills of rights "in their significant provisions are bills of liberties" (*New Paths of the Law*, p. 7). The New York released time system is a mere method for the

exercise of the religious liberties of the parents of public school pupils, and infringes on no rights of anyone, since no one else's rights are in any way affected.

[fol.127] By what process, then, in the teeth of those fundamentals, is an argument contrived for the proposition that this release of children from secular schools for religious education amounts to "an establishment of religion" or prohibits the free exercise thereof? The answer is: the argument construes the First Amendment by ignoring its language, its history and its obvious meaning, and by substituting, for its plain wording, and intendment, the metaphor (FRANKFURTER, J., in the *McCullum* case, 333 U. S. 203, 231, *supra*) or loose colloquialism of "a wall between church and State". That the "wall" has never been more than a figure of speech, is clear from the context in which it was first used by Jefferson (see as quoted by Justice REED in the dissent in *Illinois ex rel. McCollum v. Board of Educ.*, *supra*, p. 245, n.). Quite recently, the Supreme Court itself, in two of its careful opinions in the *Dennis* case (*supra*), has warned us against encasing truth in a "semantic straitjacket" (Chief Justice's opinion, p. 508) or attempting to decide great constitutional issues by the use of a "sonorous formula" (concurring opinion of Justice FRANKFURTER, p. 519). To dispose of this "unbreachable wall" or "impassable gulf" idea, we need only apply here the simple, lucid test proposed by Justice FRANKFURTER in that same *Dennis* opinion: "not what words did Madison and Franklin use, but what was in their minds which they conveyed?" (p. 523.) What was in the minds of the founders is writ as large and plain as anything on history's pages, and there is not the slightest possible warrant for ascribing to them an intent to interfere (in the guise of a "Bill of Rights"!), with parents' religious indoctrination of their own children.

One of the curiosities of history is the enlarged and distorted meaning currently being given, by some, to the simple phrase of the First Amendment: "an establishment of religion". It must be the rule as to constitutions, just as to statutes, that there is "no occasion for construction" when the phrasing "is entirely free from ambiguity" (*Wright v. United States*, 302 U. S. 583, 589; 1 Cooley's Const. Limi-

tations [8th ed.], pp. 124-126; *Matter of Carey v. Morton*, 2 N. Y. 361, 366). The language of a constitution is to be given its ordinary meaning (*Wright v. United States*, and [fol. 128] *Matter of Carey v. Morton, supra*). The fundamental purpose in construing it is to ascertain and give effect to the intent of the framers and of the people who adopted it, keeping in mind the objects sought to be accomplished and the evils sought to be prevented or remedied. Under any or all those rules and tests (and they are all one), what is the meaning of "an establishment of religion"? The Supreme Court itself gave us the answer in *Cantwell v. Connecticut* (310 U. S. 296, 303): "it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship." "Established" churches were well known to the colonists, who had experienced them in Europe and America. They knew that the phrase meant "a state church, such as for instance existed in Massachusetts for more than forty years after the adoption of the Constitution" (Corwin, *Constitution and What it Means Today* [9th ed.], pp. 155-156). When the Constitution was adopted there were still established churches in five of the States, and a few years earlier there had been nine of them in the thirteen colonies (O'Neill, *Religion and Education under the Constitution*, p. 97). "Establishment" of a church or religion always and necessarily means an act of government favoring one particular church or group of churches. Historically, that is exactly what the amendment meant to the framers of the Constitution and to the Congress and the people who adopted it. Despite all the "historical" gloss, there is one only exposition in the Annals of Congress of the meaning, and no contemporary proofs to the contrary. Madison, the author, said during the First Congress (*Annals of Congress* for August 15, 1789, Vol. I, p. 758) that the amendment mandated: "that Congress should not establish a religion, and enforce the legal observance of it by law, nor compel men to worship God in any manner contrary to their conscience". The necessity for the amendment, he went on to say, was a fear by some that Congress might otherwise have power to "make laws of such a nature as might infringe the rights of conscience, and establish a national religion" and he repeated that the amendment was intended "to prevent these effects".

Finally, he noted that the amendment was being added because "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform". Such fears [fol. 129] had indeed been expressed during the campaign to ratify the Constitution as originally drawn (see Van Doren, *The Great Rehearsal*, pp. 217, 237). No one at that time, or for years thereafter, so far as I can discover, ever attributed to the First Amendment any broader meaning. It is inconceivable that it was ever meant to prohibit governmental encouragement of, or cooperation with, religions generally. As Judge STORY pointed out in his *Commentaries* (Vol. II [5th ed.] pp. 630-631) the "general if not the universal sentiment in America was, that Christianity ought to receive encouragement".

I realize that much broader scope may seem to have been accorded to the First Amendment, by the Supreme Court, in the *Everson v. Board of Educ.* (330 U. S. 1) and *McCullum* decisions. But if such a broadening was intended in *McCullum* and *Everson* (*supra*), it has, I say with respect, no basis in the only history which is pertinent: the history of the drafting and adoption of the amendment itself. Indeed, that seems to have been conceded by the Justices who were in the majority in the *McCullum* case (see Justice FRANKFURTER, concurring, pp. 217-220 of 333 U. S.). So experienced and proficient a modern commentator as Charles P. Curtis says, while approving the *McCullum* holding, that the court reached its decision without "any justification whatever in what the Constitution says, and even less in what those who wrote it intended it to mean" (Curtis, *Modern Supreme Court*, *Vanderbilt L. Rev.*, Vol. 4, No. 3, p. 438). Indeed, Curtis surmises "that the First Congress would have rephrased the First Amendment to exclude the release of school time for religious teaching, if it had then been one of the issues of the day." The surmise is not a particularly daring one, as to those early Americans, nearly all of whose schools were religious in spirit and foundation; and who then, or just before or after, invoked the Deity in their Declaration of Independence, established chaplaincies, expressed their trust in God on their coins, and sang "America" part of which is a prayer to God to "protect us by Thy might". The spirit of those times was

that of Washington telling us in his Farewell Address that national morality cannot "prevail in exclusion of religious principle" and Edmund Burke, across the sea, warning [fol. 130] that "religion is the basis of civil society, and the source of all good and comfort". (Reflections on the Revolution in France.) Mr. Curtis says that *Everson* and *McCullum* represent judicial work "wise and well done" but his reason for that personal judgment is that he thinks that "such a use of release time would have a bad effect on our public schools" inculcating a feeling of separatism, etc. Perhaps so, but what has all that to do with the Constitution, and is it anything more than a disguised plea that the court be allowed to rewrite or amend the Constitution, to accomplish what seems, at the moment and to the incumbents, the better social policy?

Learned writers on law justify this sort of constitutional exegesis, and urge that "a written constitution, which is frequently thought to give rigidity to a system, must provide flexibility if judicial supremacy is to be permitted" (Levi, *An Introduction to Legal Reasoning*, p. 42). Rejected by them is the suggestion that "the interpretation ought to remain fixed in order to permit the people through legislative machinery, such as the constitutional convention, or the amending process, to make a change" (Levi, *id.*). The answer, says the same author, is that "a written constitution must be enormously ambiguous in its general provisions". General and sweeping, yes. But not ambiguous. Being a constitution, it should state basic law in broadest outline, available for specific applications as needed. But it cannot, I suggest, be ambiguous and be at the same time a constitution. And, regardless of all this, a particular constitution may use definite, one-shot, one-meaning words, and when such are found, as we find them here in the First Amendment, no process of legal reasoning can make them mean something else, or serve some new and unintended purpose.

Petitioners, lacking support in precedent or history, fall back on assertions that this released time method gives religion "active cooperation" and "aid in obtaining pupils" for the off-campus religious classes. If proof of such cooperation, aid and encouragement could lead to a conclusion of law that the scheme is unconstitutional, then a trial of

those allegations would be in order, and the dismissal of the petition below, without a trial, would be wrong. But [fol. 131] governmental aid to, and encouragement of, religions generally, as distinguished from establishment or support of separate sects, has never been considered offensive to the American constitutional system. If they are inimical to our fundamental law, then every President has offended by invoking the Deity in his oath of office, by issuing Thanksgiving proclamations and calling on our people to pray for victory in war, or for peace, or for our soldiers' safety. If petitioners are right, then there is a violation every time a chaplain opens a Congressional session with prayer, or an army bugler sounds "Church call". If petitioners are right, then the Pilgrims were wrong, as was every President who officially urged our people to train themselves in, and practice, religion. Our own State Constitution, on petitioners' theory, offends against American constitutionalism at the point in its preamble where it expresses gratitude "to Almighty God" for our freedom. Petitioners would have this court now deny the declarations of the Supreme Court in the *Church of Holy Trinity v. United States* case (143 U. S. 457) and of Chief Justice KENT in the *People v. Ruggles* case (8 Johns. 290) in 1811, that ours is a religious nation. I stand on Chief Justice KENT's declaration, long ago in the *Ruggles* case (p. 296), that the Constitution "never meant to withdraw religion in general, and with it the best sanctions of moral and social obligation, from all consideration and notice of the law."

The order should be affirmed, with costs.

FULD, J. (dissenting). On federal constitutional questions, the Supreme Court of the United States is, of course, the final arbiter, and, concerning the impact of the First Amendment upon religious instruction and the public school, it has recently spoken. That Amendment, the Supreme Court declared, "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. . . . the First Amendment has erected a wall between Church and State which must be kept high and impregnable." (*Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 212.) In the light of that principle,

the court ruled, the Amendment prevents the passage of any laws "which aid one religion, aid all religions, or prefer one religion over another." (*Illinois ex rel. McCollum v. Board of Education*, *supra*, 333 U. S. 203, 210; *Everson v. Board of Education*, 330 U. S. 1, 15.)

Drawing authority and direction from section 3210, subdivision 1b, of the Education Law, as amended in 1940, and rules and regulations promulgated by the New York State Commissioner of Education (Regulations of Comr. of Educ., art. 17, § 154; 1 N. Y. Official Compilation of Codes, Rules and Regulations, p. 683), the New York City Board of Education has made provision for a plan of religious instruction by individual sects for the training of public school students. The instruction is given on public school time, but not on public school property. The rules direct that, upon the written request to the school by a parent and a "duly constituted religious body" "prepared to initiate a program for religious instruction," a child is to be released from his regular classes for such instruction for one hour a week; and the public schools are required to maintain records of attendance at these religious courses and of the reasons for absence therefrom. Those children whose parents do not wish them to attend or whose religious sect has not set up a program of instruction in co-operation with the public school's regimen are kept in school to receive what the Superintendent of Schools of the City of New York refers to as "significant education work".

Petitioners challenge that program as a breach of the wall of separation erected by the First Amendment. Their standing is not questioned by respondents and many of the allegations of their petition are not disputed. They are United States citizens, residents, taxpayers and property owners in Kings County and parents of children attending public schools in the Borough of Brooklyn, New York City, where the "released time" program is in operation. Their children do not utilize that program, but instead receive regular religious instruction outside of public school hours at religious schools of their respective faiths—Zorach's child at a Protestant Episcopal religious school and Gluck's children at a Jewish religious school. Asserting that other children in the public schools are released regularly from classes for one hour each week on condition that

they attend courses for sectarian religious instruction at religious centers, petitioners seek an order directing the State Commissioner and the City Board to discontinue the program and rescind their regulations.

[fol. 133] Denied, but deemed admitted for the purposes of this motion to dismiss the petition (see, e.g., *Matter of Hines v. State Bd. of Parole*, 293 N. Y. 254, 258; *Matter of Schwab v. McElligott*, 282 N. Y. 182, 185-186), are the further allegations of the petition that the Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics "cooperates closely with the public school authorities" in managing the program and in "promoting religious instruction"; that "the system necessarily entails use of the public school machinery and time of public school principals, teachers and administrative staff"; that "the compulsory education system . . . assists and is integrated with the program of sectarian religious instruction carried on by separate religious sects"; that it "has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction"; that it "has resulted and inevitably will result in divisiveness because of difference in religious beliefs and disbeliefs"; and that "limiting" participation in the "program to 'duly constituted religious bodies' effects an unlawful censorship of religion and preference in favor of certain religious sects."

In its present posture, the case before us presents the simple question whether the program just described is infected with the same constitutional infirmity that the United States Supreme Court found in *Illinois ex rel. McCollum v. Board of Education* (*supra*, 333 U. S. 203). And, though it is ultimately upon the meaning of the First Amendment that the answer to that question depends, we are no longer free since the *McCollum* decision to place our own meaning or gloss upon that Amendment, but must read it as has the Supreme Court.

While the Champaign "released time" system which was condemned in that case differed in details from that here complained of, the court's conclusion and the principles which it enunciated are broad in scope and clearly reach far beyond the precise fact situation there presented.

In fixing upon the exact holding of the Supreme Court, there may be room for argument as to which phrase, separated from context, best reflects the sense to be distilled from the several opinions written, but there can be no doubt [fol. 134] whatsoever as to the net result. Mr. Justice REED, dissenting alone, recorded the common ground and ultimate conclusion of his brethren's opinions with the statement (333 U. S., at p. 246): "From the tenor of the opinions I conclude . . . that any use of a pupil's school time, whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban." (Emphasis supplied.)

Regarding the principles enunciated by the court, the first tenet was that the First Amendment has erected a wall "high and impregnable" between Church and State and that the state must maintain a strict neutrality, neither suppressing nor supporting religion. Speaking for a majority of six judges, Mr. Justice BLACK wrote (333 U. S., at pp. 210-211): "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

That wall was breached by the released time program in Champaign, according to the court, since by it the state effectively aided religion in two respects—(1) by making the public school buildings available and (2) by providing pupils for this or that sect's religious classes. Mr. Justice BLACK made this exceedingly plain in the following passages (pp. 209-210, 212):

"Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment. [pp. 209-210]

"Here not only are the State's tax-supported public school buildings used for the dissemination of religious doc-

trines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State. [p. 212]"

[fol. 135] Not only by direct command, but also by the pressures inherent in the functioning of the program did the Champaign system effect a breach of the wall. "The Champaign arrangement", Mr. Justice FRANKFURTER, concurring, said, "thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. . . . That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend" (p. 227).

It is not that the First Amendment begrudges the use of a portion of the school day for religious instruction that condemned the Champaign program. Rather, the objection was the utilization by state authority of the "momentum of the whole school atmosphere and school planning" behind released time: "If it were merely a question of enabling a child to obtain religious instruction with a receptive mind, the thirty or forty-five minutes could readily be found on Saturday or Sunday. If that were all, Champaign might have drawn upon the French system, known in its American manifestation as 'dismissed time,' whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school. The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning. To speak of 'released time' as being only half or three quarters of an hour is to draw a thread from a fabric" (per FRANKFURTER, J., concurring, 333 U. S., at pp. 230-231).

The statute, the regulations and the pleadings in the record before us similarly make plain the use of the state's compulsory public school machinery, its atmosphere and its

momentum. The vice in the use of such machinery to provide pupils for the religious classes is as predominant a factor in the present case as it was in *McCullum* (333 U. S., [fol. 136] at p. 212). As in that case, so here, pupils compelled by law to go to school for secular education, are released for an hour on condition that they attend religious classes. Accordingly, there is no denying that the program enables religious denominations to divert to sectarian instruction pupils assembled, and time set aside, for secular education by the state's compulsory attendance laws. Moreover, while it is true that the regulations prohibit comment on a pupil's failure to attend the religious classes, the program itself seems bound to exert certain inherent pressures on the pupils to attend. For one thing, there results an inevitable feeling of "separatism" in pupils "left behind"—to avoid which, few will hesitate to conform to the practices of their fellow students (333 U. S., at p. 227). In addition, the release from the obligation to attend public school for the one hour a week is unquestionably an inducement to register for such courses, for, it has been observed, religious instruction can compete more successfully with arithmetic than with recreation.

The co-operation of the public school system further serves to assure the attendance at the religious classes of the pupils enrolled therein. The regulations require that "Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week", together with a statement of the reason for any absence. Knowledge that an official record is kept of his attendance necessarily places pressure on the child—accustomed as he is to the discipline of school—to attend these religious classes.

Indeed, the entire vitality of the program lies in the prestige, planning, co-operation and assistance lent by the public school system, which is exactly that fusion and integration of state and religion prohibited by the First Amendment as interpreted by the Supreme Court. While, therefore, there may here be no use of public school buildings and—I am willing to assume—no use of public school funds and but little of the time of public school personnel, no one may dispute that the state affords sectarian groups

"invaluable aid" in helping to provide pupils for their religious classes through the use of its compulsory public school machinery. This is more than a "friendly gesture"—the phrase is Judge Froessel's—between Church and State. If "Separation means separation, not something [fol. 137] less", if the relation between Church and State is "a 'wall * * * not * * * a fine line easily overstepped'" (per Frankfurter, J., concurring, 333 U. S., at p. 231), then, certainly, the New York City program violates the First Amendment.

And, as was true of the Champaign plan, so here in this case, the program is necessarily divisive in its effect. As Justice Frankfurter forcefully noted:

"Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers incultation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages. [pp. 227-228]

"Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other

than religious, leaving to the individual's church and home, indoctrination in the faith of his choice. [pp. 216-217]."

Present a program where some children are released from their usual attendance at public school on condition that they attend courses in religious observance and education under the control of duly constituted religious bodies, it cannot matter, insofar as the impact of the First Amendment [fol. 138] is concerned, that such religious instruction is given off the school grounds. What is vital and operative is, not where the religious teaching is given, but that it secures its pupils through the instrumentality of the state and through the machinery and momentum of the public school system. No one disputes the power of the legislature to shorten the school day so as to afford greater opportunity for week-day religious instruction, but it may not go beyond that and lend its aid to coerce or encourage enrollment for such instruction. There is a vital distinction between coercion and what the court chooses to term "an accommodation" between "constitutional prohibitions and the right of parental control over children." (Opinion of Judge Freessel, *supra*, p. 172.)

In sum, then, what the First Amendment forbids is the fusing, through state action, of the secular and the sectarian in the field of public education. The circumstance that any sect may participate in the program is immaterial. It is not discrimination alone that the Constitution prohibits; as the Supreme Court made indisputably clear, neither the state nor its public schools may be used to "aid one religion, aid all religions, or prefer one religion over another." (333 U. S. 203, 210-211.)

I perceive no merit in the contention for which *Pierce v. Society of Sisters* (268 U. S. 510), is cited—that a challenge to the released time program is a challenge to the right of parents to control the rearing and education of their children. More specifically, it is urged that, if a parent may insist upon the complete "release" of a child from any attendance at a public school so as to permit him to pursue his studies in a parochial school, the parent has, *a fortiori*, a right to insist on the release of the child for but a small percentage of school time.

The argument goes too far. It assumes that, even though the child is enrolled in a public school, the parent has a

constitutional right to remove him therefrom for any period and at any time for instruction in sectarian religious courses. The *Pierce* case stands for no such proposition. The Supreme Court there held only that the state cannot constitutionally prevent parents from determining for themselves where their children shall be educated and whether that education shall be sectarian or nonsectarian. No one [fol. 139] questions the right of parents to send their children to private or parochial schools of their own choosing. Parents do not, however, have any constitutional right to interfere with the functioning of the public school system or to demand that it serve as an adjunct to a plan of religious instruction. Moreover, what the *McCullum* case concerned itself with, and what is here involved, is not the right of a parent, but rather a basic limitation on the power of the state. The *McCullum* case, as we have noted, invoked the doctrine of separation, not against the parent's right, but against the state's power, and held that the state may not commingle a program of religious instruction with the secular education given in its public schools. Nothing in the *Pierce* case either negates that doctrine or suggests a contrary conclusion.

It may well be that there are children growing up untutored in matters religious and, if that be so, it is a matter for grave concern. Considerations of fundamental principle, however, are involved when an attempt is made to enable religious groups to cure that lack through the instrumentality of the public school. Our constitutional policy, it has been said, "does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the [First] Amendment itself.

"It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education, that the Constitution forbids it to do so." (RUTLEDGE, J., dissenting in *Everson v. Board of Educ.*, *supra*, 330 U. S., at p. 52.)

Nor may the released time program be justified as merely another application of the immemorial and unchallenged [fol. 140] practice of releasing children from school attendance to permit them to observe their religious Holy Days. The suggested analogy confuses two entirely different and distinct matters. Religious observance of Holy Days necessarily requires attendance at church or temple at stated times which may coincide with the hours otherwise prescribed by law for school attendance. To refuse to excuse children for such religious observance would be a restraint of that freedom of religion, an interference with that liberty of worship, which the Constitution guarantees. (Cf. *West Virginia State Bd. of Educ. v. Barnette*, 319 U. S. 624, *passim*.) Obviously, no such issue is here involved.

People ex rel. Lewis v. Graves (245 N. Y. 195), upon which respondents heavily rely, did involve a scheme for released time for religious instruction somewhat similar to the one before us: on the written request of the parent alone—and not, as in this case, by a clergyman of a "duly constituted religious body" as well—the child was released for a half hour a week of what would normally have been a study session at school. However, in view of the Supreme Court's interpretation in the *McCollum* case of the controlling First Amendment, the *Lewis* case can no longer be deemed decisive, and no useful purpose is served by considering whether an appraisal of the factual differences between the New York City program and the White Plains program in the *Lewis* case would make the *Lewis* decision inapplicable even under the Constitution of New York State. In addition, and I mention it in passing, the petitioner in the *Lewis* case relied upon article IX, section 4 (now art. XI, § 4) of the State Constitution, and neither the court nor any of the parties even referred to the constitutional provision (art. I, § 3) here invoked.

It is impossible to justify the determination made below that the petition be dismissed for insufficiency. At the

very least, there should be a trial to afford petitioners an opportunity to establish by proof, if they can, such allegations as those that assert the "close cooperation" between public school authorities and those conducting the classes in religious instruction; the use of public school machinery and the time of public school personnel "necessarily entailed" by the program; the "exercise of pressure and coercion" upon parents and children to secure attendance of children at such classes; the divisive nature of the program; and the "unlawful censorship of religion and preference in favor of certain religious sects" "effected" by the program. However, I believe—as did two of the justices in the Appellate Division—that, on the basis of statute, regulations and the admitted allegations of the petition, petitioners are entitled to a decision, on the pleadings, that the released time program under consideration falls within the ban of the Federal Constitution.

Time has taught, and the Supreme Court, by its *McCollum* decision has reaffirmed, the wisdom and necessity of maintaining "a wall . . . high and impregnable" between Church and State, between public school secular education and religious observance and teaching. Maintenance of that barrier was regarded by the Supreme Court, as earlier it had been by the Founding Fathers, not as a demonstration of hostility to religion, but rather as a means of assuring complete freedom of religious worship. In my opinion, the conclusion is inescapable that the released time program in New York City breaches that barrier.

Accordingly, I would reverse and direct entry of a final order granting the relief sought in the petition.

Lewis, Conway and Dye, JJ., concur with Froessel, J.; Loughran, Ch. J., concurs for affirmance upon the authority of *People ex rel. Lewis v. Graves* (245 N. Y. 195); Desmond, J., concurs for affirmance in a separate opinion; Fuld, J., dissents in opinion.

Order affirmed.

[fol. 143] IN COURT OF APPEALS, STATE OF NEW YORK

In the Matter of the Application of TESSIM ZORACH & ano.,
Appellants, for an order &c.,

vs.

ANDREW G. CLAUSON, JR. & ORS., constituting the Board of Education of the City of New York, & ano., &c., Respondents, directing them to discontinue certain school practices, and The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, Intervenor-Respondent

REMITTITUR—July 11, 1951

Be it remembered, that on the 13th day of April in the year of our Lord one thousand nine hundred and fifty-one, Tessim Zorach & ano., the appellants in this cause, came here unto the Court of Appeals, by Kenneth W. Greenawalt, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Andrew G. Clauson, Jr. & ors., constituting the Board of Education of the City of New York, & ano. &c., the respondents and The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, the intervenor-respondent—in said cause, afterwards appeared in said Court of Appeals [fol. 144] by John P. McGrath, Nathaniel L. Goldstein, Attorney General, and Charles H. Tuttle, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Kenneth W. Greenawalt, of counsel for the appellants, and by Messrs. Wendell P. Brown and Michael A. Castaldi, of counsel for the respondents, and by Messrs. Charles H. Tuttle and Porter R. Chandler, of counsel for the intervenor-respondent, briefs filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records afore-

said, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals
of the State of New York.

[fols. 145-146] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 147] IN SUPREME COURT OF STATE OF NEW YORK

[Title omitted]

ORDER ON REMITTITUR—July 27, 1951

The petitioners above named having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the office of the Clerk of said Appellate Division on the 15th day of January 1951, which said order affirmed a final order of the Supreme Court, Kings County, entered in the office of the Clerk of the County of Kings on the 24th day of June 1950, [fol. 148] and the said appeal having been argued at the Court of Appeals by Kenneth W. Greenawalt, attorney for petitioners-appellants, by Wendell P. Brown, Solicitor General, of counsel for the respondent Commissioner of Education of the State of New York, by Michael A. Castaldi, Assistant Corporation Counsel of the City of New York, of counsel for the respondent Board of Education of the City of New York, and by Charles H. Tuttle and Porter R. Chandler, of counsel for the intervenor-respondent, The Greater New York Coordinating Committee on Released

Time of Jews, Protestants and Roman Catholics; and briefs *amici curiæ* having been filed in the said Court of Appeals by Frank E. Karelsen, Jr. and David I. Ashe, attorneys for Public Education Association & ano., by Theodore Leskes, Will Maslow and Arnold Foster, attorneys for the American Jewish Committee and others, by R. Lawrence Siegel, for Committee on Academic Freedom of the American Civil Liberties Union & ano., all in support of petitioners-appellants' position, and by Orrin G. Judd and Robert McC. Marsh, attorneys for National Council of the Churches of Christ in the United States of America, in support of respondents' position; and after due deliberation the Court of Appeals having made its decision thereupon and having ordered and adjudged that the order of the Appellate Division of the Supreme Court so appealed from be affirmed, with costs, and having further ordered that the records and proceedings in that Court be remitted to the Supreme Court, there to be proceeded upon according to law.

Now, on reading and filing the remittitur from the Court of Appeals herein dated July 11, 1951, and upon motion of Nathaniel L. Goldstein, Attorney General of the State of New York, attorney for respondent Commissioner of Education of the State of New York, John P. McGrath, Corporation Counsel of the City of New York, attorney for the respondent Board of Education of the City of New York [fols. 149-150] and Charles H. Tuttle, attorney for intervenor-respondent The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, it is

Ordered That the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and it is further

Ordered That the said order of the Appellate Division of the Supreme Court, Second Judicial Department, so appealed from, be and the same hereby is, affirmed, with costs.

Enter.

J.S.C.

Granted July 27, 1951. F. J. Sinnott, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 151] IN COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

PETITION FOR APPEAL—September 19, 1951

The petitioners herein, Tessim Zorach and Esta Gluck considering themselves aggrieved by the order and judgment of the Court of Appeals of the State of New York entered on July 11, 1951;

Do Hereby Pray that an appeal be allowed to the Supreme Court of the United States from said final order and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made in respect of the appeal bond to be given by said petitioners and that the amount of security be fixed by the order allowing the appeal; and that the entire record, proceedings and papers upon which said final order and judgment was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Dated: New York, N. Y., September 19th, 1951.

Respectfully submitted, Kenneth W. Greenawalt,
Attorney for Petitioners-Appellants, One Wall
Street, New York 5, New York.

[fol. 153] IN COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL—September 24, 1951

Tessim Zorach and Esta Gluck, the petitioners herein, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and order of the Court of Appeals of the State of New York in this cause filed on July 11, 1951, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United

States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

[fols. 154-155] Now, therefore, it is hereby ordered that the said appeal be and the same is hereby allowed as prayed for; and

It is further ordered that the appellants post a good and sufficient bond in the sum of \$250.00 as security for costs of the appeal; and

It is further ordered that citations shall issue in accordance with law; and

It is further ordered that the Clerk of the Supreme Court of the State of New York, County of Kings, shall prepare and certify a transcript of the entire record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within forty (40) days of this date or within such time as may be specified by a further order of this Court.

John T. Loughran, Chief Judge of the Court of Appeals of the State of New York.

Dated: Albany, New York, September 24th, 1951.

[fol. 156] Citation in usual form showing service on Nathaniel L. Goldstein, omitted in printing.

[fol. 157] IN COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS—September 19, 1951

Tessim Zorach and Esta Gluck, petitioners in the above entitled cause, in connection with their appeal to the Supreme Court of the United States hereby submit and file the following assignment of errors, upon which they will rely in their prosecution of said appeal from the final judgment and order of the Court of Appeals of the State of New York entered July 11, 1951.

The Court of Appeals of the State of New York erred in the following respects:

[fol. 158] 1. In affirming the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which affirmed the final order of the Supreme Court of the State of New York, Kings County, which (a) dismissed petitioners' petition on the merits as a matter of law and denied in all respects petitioners' application for an order, directed against respondents requiring them to rescind their regulations and to cause the discontinuance of the released time program in operation, as prayed for in their petition and notice of motion; (b) denied in all respects petitioners' motion for an order directing a trial in respect of triable issues of fact raised by the pleadings; (c) sustained the objections of the respondents in point of law to the petition, i. e., that the petition failed to state facts sufficient to constitute a cause of action against either of the respondents; and (d) granted in all respects the motion of the intervenor-respondent for a final order dismissing the proceedings on the merits on the ground that the petition failed to state facts sufficient to constitute a cause of action.

2. In holding that Section 3210 of the Education Law of the State of New York, particularly Par. b, subdivision 1 thereof, and the regulations established pursuant to said statute by respondent Commissioner of Education of the State of New York and by respondent Board of Education of the City of New York, are not in violation of the First and Fourteenth Amendments of the United States Constitution and do not constitute laws respecting an establishment of religion or prohibiting the free exercise of religion.

[fol. 159] 3. In holding that the operation of the released time program in the New York City schools, either as such operation is described in petitioners' petition herein or as such operation is admitted by the respondents and intervenor in their pleadings herein, does not violate the First and Fourteenth Amendments of the United States Constitution and does not violate the prohibition against laws respecting an establishment of religion or prohibit the free exercise of religion.

4. In holding that the petitioners were not entitled in this proceeding and on the pleadings of all the parties, to a final order, on the merits, granting the relief prayed for in their petition, under the provisions of the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCullum v. Board of Education*, 333 U. S. 203.

5. In dismissing petitioners' petition on the merits as a matter of law; denying in all respects the petitioners' application for an order against respondents as prayed for under Article 78 of the New York Civil Practice Act; sustaining the objections of the respondents in point of law to the petition; granting in all respects the intervenor's motion for a final order dismissing the proceeding on the merits; and denying in all respects petitioners' motion for an order, in any event, directing a trial of triable issues of facts raised by the pleadings.

6. In holding that the petition of the petitioners in this proceeding did not state facts sufficient to constitute a cause of action and to entitle them to the relief prayed for, under the provisions of the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCullum v. Board of Education*, 333 U. S. 203.

[fol. 160] 7. In holding that the decision of the United States Supreme Court in the case of *McCullum v. Board of Education*, 333 U. S. 203, and the legal and constitutional principles stated and established therein were not controlling in the determination of the constitutional issues involved in this proceeding either as presented in petitioners' petition or as presented in the pleadings as a whole.

8. In holding that the decision of the New York Court of Appeals in *People ex rel. Lewis v. Graves*, 245 N. Y. 195, 198 (decided in 1927 in respect of a released time system operated in White Plains, N. Y. and before the U. S. Supreme Court had decided *McCullum v. Board of Education*, 333 U. S. 203 or had held the freedoms guaranteed by the First Amendment were protected by the Fourteenth Amendment against laws or acts of the several states or their agencies) was a binding and controlling precedent in the determination of the constitutional issues involved and presented in this proceeding.

9. In holding that there are radical or substantial differences in elements or respects that are constitutionally important and crucial between the "released time" program in operation in Champaign County, Illinois, prior to its invalidation as unconstitutional in *McCullum v. Board of Education*, 333 U. S. 203, and the "released time" program presently authorized and established by statute and by respondents' regulations and operated in the New York City public schools.

10. In holding that the invalidation and discontinuance, as unconstitutional under the First and Fourteenth Amendments of the United States Constitution, of the New York system of released time so authorized and established by state statute and respondents' regulations and so practiced in New York City public schools, would represent "a government hostility to religion" which would be 'at war with our national tradition' or would interfere with the free exercise of religion by anyone, or would interfere with [fol. 161] any legitimate right of parents to direct the rearing and education of their children under the doctrine of *Pierce v. Society of Sisters*, 268 U. S. 510 or under the laws and Constitution of the United States.

11. In failing to hold that the New York system or program of "released time", as authorized and established by Section 3210, Par. b, subdivision 1 of the Education Law of the State of New York, the regulations of the Commissioner of Education of the State of New York and the regulations of the Board of Education of the City of New York and as actually practiced and operated in the New York City public schools violates the First and Fourteenth Amendments of the United States Constitution in that such statutes, regulations and practices constitute a law respecting an establishment of religion and prohibiting the free exercise thereof.

12. In failing to hold that Section 3210, Par. b, subdivision 1 of the Education Law of the State of New York, and the regulations of respondent Commissioner of Education and respondent Board of Education established pursuant thereto, and the operation of the released time program in the New York City public schools constitute a law respecting an establishment of religion and prohibiting the free

exercise thereof in violation of the First and Fourteenth Amendments of the United States Constitution.

13. In failing to hold that the New York system of released time, as authorized and established by state statute and by respondents' regulations and as practiced and operated in the public schools in New York City is in violation of the constitutional requirement for a separation of church and state under the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCullum v. Board of Education*, 333 U. S. 203.

[fol. 162] 14. In failing to hold, within the principles laid down by the United States Supreme Court in *McCullum v. Board of Education*, 333 U. S. 203, that the New York system of "released time", as authorized and established by state statute and by regulations of the respondents and as practiced and operated in the public schools of New York City, is a system of "released time" in which (a) is involved the utilization of the state's tax-established and tax-supported public school system to aid religious groups to spread their faith and to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals; (b) is involved the close cooperation between public school authorities and a religious council in promoting religious education for public school children during public school hours or compulsory education time; (c) the operation of the state's compulsory education system assists and is integrated with the program of religious instruction carried on by separate religious sects; (d) pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes; (e) the state affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery; (f) the momentum of the whole public school atmosphere, planning and machinery is put behind the religious instruction; (g) the inevitable result is divisiveness among public school children and the exerting of pressure and coercion upon parents and such children to secure attendance by the children at classes for religious instruction; (h) state laws and state power aid

one, or some, or all religions and prefer one religion over another; (i) taxes are levied to support religious activities or institutions; and (j) there is not a separation of church and state.

[fol. 163] 15. In failing to hold that the New York system of released time, as so authorized and established by statute and respondents' regulations and as operated in the New York City schools, is not subject to the same constitutional infirmities that the United States Supreme Court found in the case of *McCullum v. Board of Education*, 333 U.S. 203, in respect of the system or program of "released time" theretofore operated in Champaign County, Illinois.

16. In failing to hold, on the basis of the state statute, the regulations of the respondents and the admitted allegations of the petition, that the petitioners were entitled, on the merits, to an order in this proceeding granting all the relief prayed for by them in their petition.

17. In failing to hold that the limiting of participation in the New York system of released time to "duly constituted religious bodies" effects unlawful censorship of religion and effects a preference in favor of certain religious sects in violation of the First and Fourteenth Amendments of the United States Constitution.

Wherefore, petitioners Zorach and Gluck pray that the final judgment and order of the Court of Appeals of the State of New York be reversed, and for such other relief as to the Court may seem fit and proper.

Kenneth W. Greenawalt, Attorney for Petitioners-
Appellants, One Wall Street, New York 5, New
York.

Dated: New York, N. Y., September 19th, 1951.

[fol. 164] IN COURT OF APPEALS, STATE OF NEW YORK

[Title omitted]

STIPULATION—September 28, 1951

To: Francis J. Sinnott, Esq., Clerk of the Supreme Court of The State of New York, County of Kings, Hall of Records, Brooklyn, New York.

It is hereby stipulated and agreed by and between the attorneys for the parties to the above entitled cause that the entire transcript of record, without exception, should be certified and transmitted to the Clerk of the Supreme Court of the United States, which entire transcript of record consists of the following:

1. All of the papers contained in the printed "Papers on Appeal" which were filed in the Court of Appeals of the State of New York.

[fols. 165-168] 2. Opinion of the Court of Appeals of the State of New York and the two concurring opinions and the dissenting opinion.

3. Remittitur of the Court of Appeals of the State of New York.

4. Order on remittitur.

5. Petition for appeal.

6. Order allowing appeal.

7. Citation on appeal.

8. Assignment of errors and prayer for reversal.

9. Statement of jurisdiction of the Supreme Court of the United States.

10. Statement of petitioners-appellants pursuant to Rule 12, paragraph 2, of the Rules of the Supreme Court of the United States.

11. Certificate of service of Papers on Appeal.

12. This stipulation.

Dated: New York, N. Y., September 28, 1951.

Kenneth W. Greenawalt, Attorney for Petitioners-Appellants; Nathaniel L. Goldstein, Attorney General of New York; Attorney for Respondent Commissioner of Education; Denis M. Hurley, Corporation Counsel of New York, Attorney for Respondent Board of Education; Charles H. Tuttle, Attorney for Intervenor-Respondent.

[fol. 169] Proof of service (omitted in printing).

[fol. 170] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO
RELY AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED
—December 26, 1951.

Appellants adopt for their Statement of Points on which they intend to rely in their appeal to this Court, the points contained in their Assignment of Errors heretofore filed herein.

Appellants designate the entire record as heretofore filed in the above entitled cause, as necessary for the consideration of the points relied upon and for printing by the Clerk of this Court.

Dated: New York, N. Y., December 26, 1951.

Kenneth W. Greenawalt, Attorney for Appellants,
One Wall Street, New York 5, New York.

[fols. 171-172] To: Hon. Charles Elmore Cropley, Clerk, Supreme Court of the United States, Washington 13, D. C. Hon. Nathaniel L. Goldstein, Attorney General of the State of New York, Attorney for Respondent Commissioner of Education, Albany, New York. Hon. Denis M. Hurley, Corporation Counsel of the City of New York, Attorney for Respondent Board of Education, Municipal Building, New York, New York. Charles H. Tuttle, Esq., Attorney for Intervenor-Respondent, 15 Broad Street, New York 5, New York.

[fol. 173] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1951

No. 431

[Title omitted]

ORDER—December 11, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is assigned for argument immediately following No. 9, Doremus vs. Board of Education of the Borough of Hawthorne and the State of New Jersey.

(9186)

LIBRARY
SUPREME COURT, U.S.

Office Supreme Court, U. S.
FILED

NOV 16 1951

CHARLES ELMORE GROSS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 431

TESSIM ZORACH AND ESTA GLUCK,

Appellants,

vs.

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN,
GEORGE A. TIMONE AND JAMES MARSHALL,
CONSTITUTING THE BOARD OF EDUCATION OF THE CITY OF
NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

KENNETH W. GREENAWALT,
Counsel for Appellants.

INDEX

SUBJECT INDEX

	Page
Statement as to jurisdiction	1
Opinions below	1
Dates of judgment and appeal	2
Statutory provision sustaining jurisdiction	3
State statute the validity of which is involved	4
Statement of the nature of the case	9
Questions presented	12
Manner, method and time of raising federal ques- tions sought to be reviewed	13
The questions involved are substantial	18
Exhibit "A"—Opinion of the Court of Appeals of New York	23
Exhibit "B"—Opinion of the Appellate Division of the Supreme Court of New York, Second Depart- ment	53
Exhibit "C"—Opinion of the Special Term, Supreme Court of the State of New York, Kings County	56
Exhibit "D"—Opinion of Special Term, Supreme Court of the State of New York, Kings County, on denial of motion for reargument	70

TABLE OF CASES CITED

<i>Balaza v. Board of Education of St. Louis</i> , No. 18369, Div. No. 3, May 25, 1948, per Koerner, J., not offi- cially reported	20
<i>McCullum v. Board of Education</i> , 333 U. S. 203, 4, 9, 12, 13, 18	15, 21
<i>Matter of Lewis v. Spaulding</i> , 193 Misc. 66, 299 N. Y. 564	20
<i>Milwaukee County v. Carter</i> , 258 Wisc. 139, 45 N. W. (2d) 90	4
<i>Niemotko v. Maryland</i> , 95 S. Ct. 237	20
<i>People ex rel. Latimer v. Board of Education</i> , 394 Ill. 228	20

	Page
<i>People ex rel. Lewis v. Board of Education</i> , 245 N. Y. 195	20
<i>People ex rel. Lewis v. Graves</i> , 245 N. Y. 195	15
<i>People ex rel. Lewis v. Spaulding</i> , 193 Misc. 66, 299 N. Y. 564	
<i>Railway Express v. New York</i> , 336 U. S. 106	4
<i>Williams v. New York</i> , 337 U. S. 241	4
<i>Zorach v. Clauson</i> , 198 Misc. 631, 99 N.Y.S. (2d) 33, 124 N. Y. Law Journal, Issue of August 23, 1950, co. 5, p. 299, 278 App. Div. 573, 103 N.Y.S. (2d) 27, 303 N. Y. 161, 100 N. E. (2d) 463	2

STATUTES CITED

Constitution of the United States:

First Amendment	11, 12
Fourteenth Amendment	11, 12
Education Law of the State of New York, Section 3210 (1)(b); Laws of 1940, Ch. 305; McKinney's Consolidated Laws of New York, Book 16, Part 1, Art. 65, Part I, p. 761	4
New York Civil Practice Act, Article 78	
Regulations of the Commissioner of Education, Art. 17, Sec. 154, 1 N. Y. Official Compilation of Codes, Rules and Regulations at p. 683	4
"Sees 'Released Time' Renewal" (published in The Christian Century of September 12, 1951, page 1056)	22
United States Code, Title 28, Section 1257(a)	3

COURT OF APPEALS STATE OF NEW YORK

In the Matter of the Application of TESSIM ZORACH
and ESTA GLUCK, Petitioners-Appellants, for an
Order Pursuant to Article 78 of the Civil Practice Act,
against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN,
GEORGE A. TIMONÉ, and JAMES MARSHALL,
Constituting the Board of Education of the City of New
York and FRANCIS T. SPAULDING, Commissioner of
Education of the State of New York, Respondents,
Directing Them to Discontinue Certain School Practices,
and THE GREATER NEW YORK COORDINATING
COMMITTEE ON RELEASED TIME OF JEWS,
PROTESTANTS AND ROMAN CATHOLICS, Inter-
venor-Respondent.

JURISDICTIONAL STATEMENT

May It Please the Court:

In support of the jurisdiction of the Supreme Court of
the United States to review the above-entitled cause on
appeal and in compliance with Rule 12 of the Rules of
that Court, Petitioners-Appellants respectfully represent:

Opinions Below

The opinion of the Court of Appeals of the State of
New York in this cause (including concurring and dis-
senting opinions), filed July 11, 1951, is reported in 303

N. Y. 161; 100 N. E. (2d) 463, and a copy thereof is appended hereto as Exhibit "A".

The opinion of the Appellate Division of the Supreme Court, State of New York, Second Department (including dissenting opinion), filed January 15, 1951, is reported in 278 App. Div. 573; 103 N.Y.S. (2d) 27; and a copy thereof is appended hereto as Exhibit "B".

The opinion of Special Term, Supreme Court, State of New York, Kings County, filed June 19, 1950, is reported in 198 Misc. 631; 99 N.Y.S. (2d) 339, and a copy thereof is appended hereto as Exhibit "C".

The opinion of said Special Term, on its denial of petitioners' motion for reargument, filed on or about August 22, 1950, is reported unofficially in 124 N. Y. Law Journal, issue of August 23, 1950, col. 5, p. 299, and a copy thereof is appended hereto as Exhibit "D".

Dates of Judgment and of Appeal

The judgment and order of the Court of Appeals affirming the order appealed of the Appellate Division of the Supreme Court, Second Department, as well as the opinion of the Court of Appeals, were filed on July 11, 1951. Also, on that date the remittitur of the Court of Appeals was issued to the Supreme Court, State of New York, Kings County. An order on remittitur was filed in the Supreme Court, State of New York, Kings County, on July 30, 1951, by which the order and judgment of the Court of Appeals was made the order and judgment of that Court and the order of the Appellate Division of the Supreme Court, Second Department, was affirmed.

The application for appeal to the United States Supreme Court was presented to the Chief Judge of the Court of Appeals of the State of New York on September 19th, 1951.

Statutory Provision Sustaining Jurisdiction

The appeal is within the jurisdiction of the United States Supreme Court under Title 28 U.S. Code, § 1257 (2), which provides that a final judgment or decree rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court of the United States as follows:

“By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.”

This proceeding, brought under Article 78 of the New York Civil Practice Act, and the judgment appealed from of the Court of Appeals of New York draws in question, under the Constitution and laws of the United States, the validity of the act of the New York State Legislature in enacting Section 3210 (1) b of the Education Law of the State of New York and the rules and regulations of respondent Commissioner of Education of the State of New York and of respondent Board of Education of the City of New York established and promulgated on the authority and pursuant to such statute and the operation in the public schools of New York City of a “released time” program under the authority of such statute and such rules and regulations.

The statute expressly authorizes and sanctions said rules and regulations of respondents and the operation by respondent Board of Education of said released time program in New York City public schools and has been so construed herein by the Court of Appeals of New York.

The following decisions, among others, sustain the jurisdiction of the United States Supreme Court to review the judgment of the Court of Appeals of direct appeal in this

4

cause: *McCollum v. Board of Education*, 333 U.S. 203, 206 (1948); *Niemotko v. Maryland*, 95 U.S. Sup. Ct. (Law Ed.) 237, 238 (1951); *Williams v. New York*, 337 U.S. 241, 243 (1949); *Railway Express v. New York*, 336 U.S. 106, 108 (1949).

State Statute the Validity of Which Is Involved

This cause or proceeding involves the validity of a state statute (§ 3210 (1) b of the Education Law of the State of New York; Laws of 1940, Ch. 305; McKinney's Consolidated Laws of New York, Book 16, Part 1, Art. 65, Part I, p. 761); the validity of the rules and regulations of the Commissioner of Education of the State of New York established pursuant to and on the authority and in implementation of said statute (Regulations of Commissioner of Education, Art. 17, § 154; 1 N. Y. Official Compilation of Codes, Rules and Regulations at p. 683); the validity of the rules and regulations of the Board of Education of the City of New York established pursuant to and on the authority and in implementation of said statute and said rules and regulations of the Commissioner of Education; and the validity of the "released time" program actually operated in the New York City public schools under the authority of said statute and said rules and regulations and by act of the respondent Board of Education in cooperation with a local religious council (the intervenor herein) and other religious organizations.

Section 3210 of the Education Law of New York, which is part of the "Compulsory Education" law, provides in part as follows:

"§ 3210. *Amount and character of required attendance.*

1. Regularity and conduct. (a) A minor required by the provisions of part one of this article to attend

upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending. (b) *Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.*" (italics supplied)

The italicized subdivision, here in question, was added to the law as an amendment by the Laws of New York, 1940, Ch. 305.

The said rules and regulations established by the State Commissioner of Education on July 4, 1940, which are still in force and effect, are as follows:

"1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil."

"2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies."

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities."

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week."

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities."

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

The said rules and regulations established by the Board of Education of the City of New York on November 13, 1940, are as follows:

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

"2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

"3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week, except that in classes on a departmental schedule release will be limited to the last period of the program.

"5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

"6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

The latter rules and regulations have continued in full force and effect without change, except Rule No. 4 which was amended by said Board of Education on September 4, 1941, to read as follows:

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

The operation of the "released time" program in the New York City public schools by act of said Board of Education in cooperation with a religious council (the intervenor) and other religious organizations is described in the petitioners' petition herein and, also, in the answers and accompanying papers of respondents and intervenor.

The program is set up and operated by respondent, Board of Education, under such statute, rules and regulations. The intervenor, Coordinating Committee, or particular religious organization, distribute, either to parents of public school children at home or in churches or to public school children at or near, the public school premises, cards entitled "Registration for Released Time Religious Instruction", to indicate the parent's desire and approval of his child's being released from public school for sectarian religious instruction during school hours at a place outside of the school building and grounds and to specify the particular religious center to which the child is to go. Such registration cards are delivered by the children to the principal and are retained and filed in the office of the local public school. The public school authorities in turn deliver lists of the children, whose parents so consent, to the Coordinating Committee or other religious organizations or to the religious centers at which the instruction is to be given.

The Board of Education sets up and prescribes a schedule for released time instruction for a certain hour of a certain day each week for each of the five boroughs of the City of New York.

The children whose parents have signed such cards are released regularly for one hour each week from attendance at the public school classes on condition that they attend, during the "released" hour, at the religious center for sectarian religious instruction. The parents who sign such consent cards thus enter into an understanding with the public school authorities that their children will attend and receive sectarian religious instruction at the religious centers in consideration of their children being released from attending at regular public school classes.

Children whose parents do not sign such consent cards are separated from the other children and are required to continue in attendance at the public schools in pursuance of secular work or studies. The children who are released receive sectarian religious teaching in the faith of the center which they attend. At weekly intervals the religious centers file with the local public school authorities and the Coordinating Committee lists of the children who have been released from public schools but have not reported for religious instruction at the religious centers, which reports of attendance contain a statement of the reasons for any absence from such courses by the pupils.

The released time program in New York City is under the supervision of said intervenor Coordinating Committee, which committee was formed to promote religious instruction through the use of the public school system and co-operates closely with the public school authorities in the planning, promotion and management of such program. The program is operated by respondent Board of Education.

Statement of the Nature of the Case

This proceeding was brought by petitioners pursuant to Article 78 of the New York Civil Practice Act, which relates to proceedings against a body or officer and to proceedings formerly known in New York as certiorari to review, mandamus and prohibition.

This proceeding is in the nature of a mandamus. It challenges the constitutionality of the "released time" program operated in the New York public schools and the state statute and the rules and regulations of the respondents authorizing and establishing such released time program. The bases of this challenge are the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in the case of *McCollum v. Board of Education*, 333 U.S. 203.

This proceeding was started in July, 1948, but, because of a collateral attack by respondent Commissioner of Education on the jurisdiction of the Supreme Court, Kings County, pursued through the highest appellate court of New York, a hearing on the merits of the petition and proceedings was long delayed. In due course respondents served their respective answers to the petition, which were supplemented by affidavits and contained an objection in point of law. The intervenor, also, served an answer containing affirmative defenses to which petitioners served a reply.

Each of petitioners is a United States citizen, resident, taxpayer and property owner in Kings County, New York, and the parent of a child or children who attend public schools in the City of New York in the Borough of Brooklyn, County of Kings, in which the "released time" program in question is in operation. None of the children of the petitioners participates in the released time program but all regularly attend Protestant Episcopal and Jewish schools,

respectively, for religious instruction at times other than the hours in which public schools are in session. When other pupils in these schools were released to attend classes of religious instruction outside of the schools, they were required to continue their secular studies and work in the public schools.

In petitioners' petition are alleged the released time statute (Sec. 3210 (1) b of the Education Law) and the rules and regulations of each of the respondents (the text of which appears above). As alleged in said petition, respondent Commissioner of Education is the chief executive officer of the New York State system of education, is charged with enforcement of laws relating to the educational system of the State, the execution of state educational policies and the general supervision of all schools subject to the provisions of the Education Law. Respondent Board of Education has immediate supervision and control of the public school system of the City of New York. The released time program in New York City is under the general supervision of an organization known and referred to herein as the "Coordinating Committee" (the intervenor), which closely cooperates with the public school authorities in the planning, management and operation of the released time program.

The petition alleges the manner in which said released time program is actually operated in the New York City schools. This is described above. Concededly and stated generally, by such program pupils attending public schools for secular studies under the New York compulsory education law are released, during public school hours by the school authorities and on written request of parents and a duly constituted religious body prepared to initiate such program of religious instruction, from attendance at the public schools and upon the secular studies thereof for one hour each week in order to attend courses in religious in-

struction in their faiths, held at religious centers outside of school property. Pupils whose parents do not request their attendance upon such religious courses or whose religious sect has not set up a program for religious instruction in co-operation with the regimen of the public school are kept in school to pursue their secular studies and work. The registration cards for such religious courses and reports of attendance or absence of pupils at such religious courses are filed with the local public school authorities.

As alleged in the petition, each respondent, upon petitioners' demand, refused to rescind their respective rules and regulations and to discontinue the released time plan in operation. Also, as alleged in the petition, the administration of the released time system necessarily entails the use of the public school machinery and time of public school employes; the operation of the compulsory public school education system in New York assists and is integrated with such program of sectarian religious instruction and pupils compelled by law to go to school for secular instruction are released in part from their legal duty on the condition that they attend religious classes; the system results necessarily in the exercise of pressure and coercion on parents and children to secure attendance by the children for religious instruction; is a utilization of the state's tax-established and tax-supported public school system to aid religious groups to spread their faith; and results inevitably in divisiveness among the public school children because of the differences in beliefs or disbeliefs.

Petitioners contend, that not only the state statute and the rules and regulations of the respondents but, also, the released time program as actually operated—either as set forth in allegations of the petition or as admitted by the pleadings as a whole—violate the First and Fourteenth Amendments of the United States Constitution.

Questions Presented

The questions presented by this appeal are set forth with particularity in the Assignment of Errors which accompanies the petition for appeal. Briefly summarized, these questions are as follows:

1. Whether Section 3210 (1) b of the Education Law of New York and the rules and regulations authorized and established pursuant thereto by the respondents are in violation of the First and Fourteenth Amendments of the United States Constitution as constituting laws respecting an establishment of religion and prohibiting the free exercise thereof?

2. Whether the operation of the "released time" program in the public schools of New York City—either as such operation is described in petitioners' petition herein or as such operation is admitted by all of the pleadings herein—violates the First and Fourteenth Amendments of the United States Constitution and the interdiction therein against laws respecting an establishment of religion and prohibiting the free exercise thereof?

3. Whether the New York system of released time, as authorized and established by Section 3210 (1) b of the Education Law and by the rules and regulations of each of the respondents and as actually operated and practiced in the public schools of New York City, violates the First and Fourteenth Amendments of the United States Constitution and the principles set forth by the United States Supreme Court in *McCullum v. Board of Education*, 333 U.S. 203?

4. Whether petitioners' petition herein states facts sufficient to constitute a cause of action and whether petitioners are entitled, on the pleadings and on the merits, to an order as prayed for in their petition, under the provisions of the First and Fourteenth Amendments of the United States

Constitution and the decision of the United States Supreme Court in *McCollum v. Board of Education*, 333 U.S. 203?

5. Whether the limiting of participation in the New York system of released time to "duly constituted religious bodies" is in violation of the First and Fourteenth Amendments of the United States Constitution?

Manner, Method and Time of Raising Federal Questions Sought to Be Reviewed

This proceeding was initiated in the Supreme Court, New York, Kings County, under the provisions of said Article 78, by petitioners serving and filing their petition and notice of application (Papers on Appeal, pp. 11-23).

The Federal questions sought to be reviewed on this appeal were raised by petitioners at every stage of the proceeding, in all the state courts having jurisdiction.

Such Federal questions were first raised by and in the petition, wherein, it was alleged by petitioners in Paragraphs Seventeenth, Eighteenth, Nineteenth and Twentieth (Papers on Appeal, pp. 21-22) that the state statute (Sec. 3210 (1) b of the Education Law), the rules and regulations established by respondents pursuant thereto and the operation of the released time program in the public schools of New York City violated the First and Fourteenth Amendments of the United States Constitution and the prohibitions therein against laws respecting an establishment of religion and prohibiting the free exercise of religion. Also, in Paragraphs Twelfth, Thirteenth, Fourteenth and Fifteenth of said petition, petitioners alleged specific elements and features present in the operation of such program that brought it in conflict with the law of the United States, as set forth by the United States Supreme Court in *McCollum v. Board of Education*, 333 U.S. 203.

In its opinion the Court at Special Term of Supreme Court, Kings County, New York, stated that "The question

validly presented by this proceeding is solely addressed to the constitutionality of the statute and regulations"; that it had reached a determination adversely to petitioners on the paramount legal question in the case, namely, the constitutionality of the statutes and regulations; and that the "released time" program, the statute and regulations were not unconstitutional (Papers on Appeal, fols. 290, 266-7, 285-6, 288, 293-4).

The Court at Special Term further held that "the present 'released time' program contains none of the objectionable features of the plan in that case (ie. the *McCullum* case) which was the basis of the decision in the Supreme Court of the United States holding the plan to be unconstitutional"; and that the "subsequent decision of the courts in this state in *Matter of Lewis v. Spaulding* (supra) is clearly determinative of the constitutionality of the plan under attack" (Papers on Appeal, fols. 285-90). That Court further stated it found that "assuming all of the facts set forth in the petition are deemed to be true", nothing appeared to warrant a finding that the statute and regulations adopted by the respondents were unconstitutional. That Court referred to and quoted from the concurring and dissenting opinions of the United States Supreme Court in the *McCullum* case, but failed to mention the opinion of the Court therein written by Mr. Justice Black.

Such Federal questions were raised and discussed at length in the oral arguments and briefs of the parties at Special Term.

On petitioners' motion for reargument, which was denied, the Court at Special Term stated:

"This is a motion for a reargument of a motion heretofore decided by this Court which sought to have declared unconstitutional the 'released time' program for religious instruction now in effect in the public elementary schools of this city."

Then, after referring to the *McCollum* case and to the cases of *Matter of Lewis v. Spaulding*, 193 Misc. 66, appeal withdrawn, 299 N.Y. 564, and *People ex rel. Lewis v. Graves*, 245 N.Y. 195, Special Term continued:

"This court must reaffirm its determination of constitutionality on the basis of the above decisions and hold to its distinction between the New York and the Champaign plans."

Such Federal questions were next raised in the oral argument and printed briefs of the parties in the Appellate Division and were passed on by that Court in both the majority and dissenting opinions. The majority opinion stated:

"Petitioners contended, for reasons set forth in their petition, that the regulations so established and the operation thereunder of the 'released time program' in New York City, pursuant thereto, prohibited the free exercise of religion in violation of the First and Fourteenth Amendments of the United States Constitution, and Section 3, Article 1 of the Constitution of the State of New York, and that Section 3210 of the Education Law, if construed to authorize the establishment of such regulations and the operation of the released time program thereunder as described in their petition, was also unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution."

The majority opinion stated that "Subdivision 1b of Section 3210 of the Education Law, . . . is in no way unconstitutional" and that no constitutional rights of the petitioners were invaded by the adoption of the regulations complained of or the operation thereunder of the released time program.

The minority opinion pointed out that there was no substantial difference, constitutionally, between the New York

City program and the Champaign, Illinois program and that the New York City program is void because it possesses the factors which this Court held to be constitutionally critical in the *McCollum* case. (See Papers on Appeal, fols. 327-332.)

Such Federal questions were next raised in the Court of Appeals in the oral argument and printed briefs of the parties and were passed on by that Court in the majority, concurring and dissenting opinions.

In the majority opinion, the Court states:

"This appeal challenges the constitutionality of the long-standing 'released time' program in New York City, whereby parents may withdraw their children from the public schools one hour a week to receive religious instruction in the faith of their acceptance.

"Appellants . . . challenge by this article 78 proceeding the constitutionality of the foregoing statute and rules *in toto*, upon the ground that they violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Federal Constitution, as applied to the States by the Fourteenth Amendment, and prohibit the free exercise of religion in violation of the First and Fourteenth Amendments of the Federal Constitution and Section 3 of Article 1 of our State Constitution.

"Under the circumstances, whether the released time program is constitutional is solely a question of law, and the case has been so treated by Special Term as well as by the Appellate Division majority and dissenters."

The concurring opinion by Judge Desmond stated:

"This is a mandamus proceeding (Civ. Prac. Act, Art. 78) brought to compel the New York City Board

of Education and the State Commissioner of Education, to discontinue and abolish the so-called 'released time program' in the city's public schools, on the alleged ground that the release of children from those schools, for one hour a week, at the request of parents, to attend outside religious instruction in their several faiths, violates the Federal Constitution as to its First Amendment, made applicable to the States by the Fourteenth Amendment. Specifically, it is the contention of petitioners that the program as conducted in New York City, and the State statute and State and local regulations under which it operates, are violative of the U. S. Constitution within the principles set forth in the *McCullum* decision, that is, *Illinois ex rel. McCullum v. Board of Educ.* (333 U. S. 203). I vote for affirmance, because I see no basis for any claim of unconstitutionality."

The dissenting opinion stated:

"Petitioners challenge that program as a breach of the wall of separation which the First Amendment erected.

"In its present posture, the case before us poses the simple question whether the program just described is infected with the same constitutional infirmity that the United States Supreme Court found in *McCullum*. And, though it is ultimately upon the meaning of the First Amendment that the answer to that question depends, we are no longer free since the *McCullum* decision to place our own meaning or gloss upon that Amendment, but must read it as has the Supreme Court.

"In the words of Mr. Justice Black, 'This is not separation of Church and State' (*supra*, 333 U. S., p. 212). This is more than a 'friendly gesture'—the phrase is Judge Froessel's—between church and State; obvi-

ously it is not the separation demanded by the Constitution.

"Time has taught, and the Supreme Court, by its decision in *McCollum* has reaffirmed, the wisdom and necessity of maintaining 'a wall . . . high and impregnable' between Church and state, between public school secular education and religious observance and teaching. . . . Whether the released time program in New York City breaches that barrier is the only issue before us. I believe that it does.

"However, as I have already indicated, I believe—as did two of the Justices in the Appellate Division—that, on the basis of statute, regulations and the admitted allegations of the petition, petitioners are entitled to a decision, on the pleadings, that the released time program under consideration falls within the ban of the Federal Constitution.

"Accordingly, I would reverse and direct entry of a final order granting the relief sought in the petition."

All of the opinions mentioned above discussed the decision of the United States Supreme Court in *McCollum v. Board of Education*, 333 U. S. 203.

Manifestly, the rulings of all of the Courts of the State of New York were of a nature to bring this cause within the statutory provision stated above to confer jurisdiction on the United States Supreme Court.

The Questions Involved Are Substantial

The appeal in this case presents to the Supreme Court of the United States the important question of the constitutionality, under the First and Fourteenth Amendments of the United States Constitution and the decision in *McCollum v. Board of Education*, 333 U. S. 203, of the New York system or program of "released time", as authorized

and established by State statute and respondents' rules and regulations and as operated in the public schools of New York City.

This New York system of released time was placed before that Court in the *McCullum* case in an *amicus curiae* brief filed on behalf of Protestant Council of City of New York by the attorney for the intervenor in this proceeding, and was referred to in detail in the dissenting opinion of Mr. Justice Reed in that case at pages 250-51, footnotes 20, 21, 22.

It seemed manifest that the United States Supreme Court, in the *McCullum* case, had clearly indicated that released time systems, and certainly released time systems of the Champaign, Illinois and New York types, violated the American tradition of separation of Church and State as set forth in the First and Fourteenth Amendments, and had held, as Mr. Justice Reed stated in his dissenting opinion, that "Under it (i.e. that Court's judgment) . . . children cannot be released or dismissed from school to attend classes in religion while other children must remain to pursue secular education. Teachers cannot keep the records as to which pupils are to be dismissed and which retained. To do so is said to be an 'aid' in establishing religion; the use of public money for religion".

That seemed even plainer when, in giving effect to that decision, the Circuit Court of Champaign issued its final order for mandamus in which the local Board of Education was ordered "To prohibit within said original School District Number 71 the use of the state's public school machinery to help enroll pupils in the several religious classes of sectarian groups", and when, thereafter, said Board of Education discontinued religious instruction during public school hours and substituted therefor a program of religious instruction during after school hours.

That action seemed especially significant since the Illinois Courts, in deciding the *McCollum* case, had relied upon an earlier case entitled "*People ex rel. Latimer v. Board of Education*, 394 Ill. 228 (which had involved a system of released time, exactly like New York's and in which the Illinois Supreme Court had cited and relied upon the early New York case of *People ex rel. Lewis v. Board of Education*, 245 N. Y. 195). In its decision in the *McCollum* case, 396 Ill. 14, the Illinois Supreme Court held that the program involved in the *Latimer* case was to all intents and purposes exactly like that involved in the *McCollum* case, except that the classes were held outside of the classrooms. In other words, so far as the Illinois Courts were concerned, there was no essential difference, constitutionally, between the New York type of released time and the Champaign type of released time; and the reversal of their decision in the *McCollum* case was, also, an indication that the United States Supreme Court regarded the two types of programs as essentially similar, constitutionally.

Subsequent to the decision of the United States Supreme Court in the *McCollum* case, a system of released time in operation in St. Louis similar to that in operation in New York City was invalidated, as unconstitutional on the basis of the *McCollum* decision, by the St. Louis Circuit Court. (See *Balaza v. Board of Education of St. Louis*, #18369, Div. No. 3, May 25, 1948 per Koerner, J.—not officially reported.) Also, in *Milwaukee County v. Carter*, 258 Wisc. 139; 45 N. W. (2) 90 (Dec. 1950), the Supreme Court of Wisconsin recently approved the broad principle of the *McCollum* case that the use of public school time and of the agency of the compulsory education law for religious instruction is unconstitutional.

Nevertheless, in New York respondent Commissioner of Education and respondent Board of Education both refused

to comply with the written demands made by each of the petitioners on June 27, 1948 (on the basis of the *McCollum* decision and the constitutional provisions) to rescind their rules and regulations establishing the released time program and to discontinue the operation of that program in the New York City public schools and said respondents have since persisted in such refusal.

Upon such refusal by respondents, petitioners instituted this proceeding against them in July, 1948. A hearing and decision on the merits of their proceeding and petition was delayed because of a prolonged and unsuccessful attack by the Commissioner of Education on the jurisdiction of the Supreme Court, Kings County (see 86 N.Y.S. (2d) 17; aff'd. 275 App. Div. 774; aff'd. 300 N.Y. 613).

Respondents have now been upheld in their refusals by the New York State Courts, but not without strong dissents in the Appellate Division and the Court of Appeals. While this proceeding was being delayed on the jurisdictional point, a decision was rendered by the Supreme Court, Albany County, New York, in *Matter of People ex rel. Lewis v. Spaulding*, 193 Misc. 66 (1948), appeal withdrawn 299 N.Y. 564, in which it was held that the New York system of released time as set forth in said statute and regulations—without reference to any facts regarding the actual operation of such released time program in the public schools—was not unconstitutional.

The attitude of the New York State and City educational authorities and the New York Courts appears to petitioners to be wholly unjustified in light of the *McCollum* case, but it has created the urgent necessity of having the issues in this cause reviewed by the United States Supreme Court.

Released time systems essentially similar to that authorized and operated in New York are still in operation in other localities and states in various parts of the country. Only a decision of the United States Supreme Court will

clarify the confusion and resolve the judicial conflict which now exists in the States on the subject of the validity and constitutionality of such a released time system, as a result of the New York Court decision.

It appears from a news article headed "Sees 'Released Time' Renewal" (published in *The Christian Century* of September 12, 1951, page 1056) that, according to Dr. Edwin L. Shaver of a national religious education council, most of the released time programs which were discontinued after the United States Supreme Court's decision in the *McCullum* case will now be resumed as a result of the decision of the Court of Appeals herein. Such acts would substantially nullify the decision in the *McCullum* case. (The Dr. Shaver referred to is identified in the *McCullum* decision at pages 228, 252, as a leading proponent of and a writer on released time.)

It is of utmost importance that the questions raised in this cause be decided by the United States Supreme Court finally and at an early date.

These questions are of great interest to the public, public school children and their parents, public school educators, governmental authorities and religious organizations, not only in New York State but throughout the nation.

For all of the reasons mentioned above, it is respectfully submitted that the Federal questions presented are substantial and that petitioners' appeal in this cause to the United States Supreme Court should be allowed.

Respectfully submitted,

KENNETH W. GREENAWALT
Attorney for Petitioners-Appellants

One Wall Street,
New York 5, New York.

EXHIBIT "A"

OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW
YORK (303 N. Y. 161; July 11, 1951)

COURT OF APPEALS

In the Matter of the Application of **TESSIM ZORACH** and
ESTA GLUCK, *Petitioners-Appellants*,
for an order pursuant to Article 78 of the Civil Practice Act,
against

ANDREW O. CLAUSON, JR., ET AL., constituting the Board of
Education of the City of New York, and **FRANCIS T.**
SPAULDING, Commissioner of Education of the State of
New York, *Respondents*,

directing them to discontinue certain school practices,
and

THE GREATER NEW YORK COORDINATING COMMITTEE ON RE-
LEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,
Intervenor-Respondent.

Appeal from an order of the Appellate Division of the
Supreme Court in the second judicial department, entered
January 15, 1951, which, by a dividend court, affirmed an
order of the Supreme Court at Special Term (Di Giovanna,
J.; opinion 198 Misc. 631), entered in Kings County in a
proceeding under article 78 of the Civil Practice Act (1)
denying a motion by petitioners for an order directing a
trial in respect to asserted issues of fact, (2) granting a
cross motion of the intervenor-respondent for an order
directing a dismissal of the proceeding on the merits, (3)
sustaining objections of respondents to the petition, and (4)
denying petitioners' application and dismissing the petition
on the merits.

FROESSEL, J.:

This appeal challenges the constitutionality of the long
standing "released time" program in New York City,

whereby parents may withdraw their children from the public schools one hour a week to receive religious instruction in the faith of their acceptance.

For many years released time existed in this State without express statutory authority. Then in 1940 the State Legislature, by an almost unanimous vote and with the approval of Governor Lehman (1940 Papers of Governor Lehman, p. 328), added (1. 1940, ch. 305) to the Education Law, which governs, among other things, the attendance of minors in public schools, the following provision:

"Absence for religious observance and education shall be permitted under rules that the commissioner (of education) shall establish."

Pursuant to this provision, which is now found in subdivision 1-b of section 3210 of the Education Law, the State Commissioner of Education has promulgated the following rules (Regulations of the Comr. of Education, Art. 17, § 154; State of N. Y. Official Compilation of Codes, Rules and Regulations, Vol. 1, p. 683):

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

6. In the event that more than one school for religious observance and education is maintained in any

district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Additional rules have been established by the New York City Board of Education:

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week except that in classes on a departmental schedule release will be limited to the last period of the program.

5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Appellants, parents of children attending public schools in New York City who do not avail themselves of this program and are in nowise obliged to do so, challenge by this Article 78 proceeding the constitutionality of the foregoing statute and rules *in toto*, upon the ground that they violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Federal Constitution, as applied to the states by the Fourteenth Amendment, and prohibit the free exercise of religion in violation of the First and Fourteenth Amendments of the Federal Constitution and Section 3 of Article I of our State Constitution. The courts below have denied them relief and dismissed the proceeding.

In support of their contention, appellants rely primarily on *McCullum v. Board of Education*, 333 U. S. 203. There, a local board of education in Champaign County, Illinois, participated in a released time program which differed radically from the one before us. There was no underlying state enabling act. Religious training took place in the school buildings and on school property. The place for instruction was designated by the school authorities. Pupils taking religious instruction were segregated by school authorities according to faiths. School officials supervised and approved the religious teachers. Pupils were solicited in school buildings for religious instruction. Registration cards were distributed by the school, and in one case printed by the school. None of these factors is present in the case before us, and, accordingly, the Supreme Court's holding that the Champaign released time program was constitutionally invalid is not controlling here.

In the New York City program there is neither supervision nor approval of religious teachers and no solicitation of pupils or distribution of cards. The religious instruction must be outside the school building and grounds. There must be no announcement of any kind in the public schools relative to the program and no comment by any principal

or teacher on the attendance or nonattendance of any pupil upon religious instruction. All that the school does besides excusing the pupil is to keep a record—which is not available for any other purpose—in order to see that the excuses are not taken advantage of and the school deceived, which is, of course, the same procedure the school would take in respect of absence for any other reason.

It is manifest that the *McCollum* case is not a holding that all released time programs are *per se* unconstitutional. The Supreme Court's decision is limited to the fact situation before it. Thus, Mr. Justice Black, writing for the Court, reviewed the evidence so far as undisputed and stated (p. 209) that the "foregoing facts" (emphasis supplied)

"show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education."

In the instant case, there is no "use" of tax-supported "property or credit or any public money" "directly or indirectly" "in aid or maintenance" of religious instruction (*People ex rel. Lewis v. Graves*, 245 N. Y. 193, mot. for rearg. den. 245 N. Y. 620, affg. 219 App. Div. 233, affg. 127 Misc. 135), and there is no such cooperation as in the *McCollum* case between the school authorities and the religious committee in promoting religious education.

Other justices who wrote in the *McCollum* case were even more explicit in placing boundaries on the determination. Mr. Justice Frankfurter, in a concurring opinion in which three other justices joined, stated:

"Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication" (p. 225).

"The substantial difference among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does 'released time' operate in Champaign" (p. 226)?

"We do not consider, as indeed we could not, school programs not before us which, though colloquially

characterized as 'released time', present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable" (p. 231).

Mr. Justice Jackson, in addition to agreeing with the limitations expressed by Mr. Justice Frankfurter, added reservations of his own, and stated:

"we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain" (p. 232),

and that

"it is important that we circumscribe our decision with some care" (p. 234).

Mr. Justice Reed, who dissented from the Court's holding, pointed out (pp. 239-240) that expressions in the opinions of his colleagues

"seem to leave open for further litigation variations from the Champaign plan."

Thus, in addition to the reference in the Court's opinion to the "foregoing facts" of the Champaign plan as showing its unconstitutionality, we have five other justices expressly agreeing that released time as such is not unconstitutional.

Binding precedent must therefore be found in our own decision of nearly twenty-five years ago in *People ex rel. Lewis v. Graves*, *supra*, which involved a released time program in the City of White Plains. Such program, except for the absence of a state enabling act, was substantially the same as the one now in issue. Judge Pound, writing for a unanimous court, its other distinguished members having been Chief Judge Cardozo, and Judges Crane, Andrews, Lehman, Kellogg and O'Brien, there said (p. 198):

"A child otherwise regular in attendance may be excused for a portion of the entire time during which

the schools are in session, to the extent at least of half an hour in each week to take outside instruction in music or dancing without violating the provisions of the Compulsory Education Law, either in letter or spirit. Otherwise the word 'regularly' as used in the statute would be superfluous. Practical administration of the public schools calls for some elasticity in this regard and vests some discretion in the school authorities. Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. * * *

The separation of the public school system from religious denominational instruction is thus complete. Jealous secretaries may view with alarm the introduction in the schools of religious teaching which to the unobservant eye is but faintly tinted with denominationalism. Eternal vigilance is the price of constitutional rights. But it is impossible to say, as matter of law, that the slightest infringement of constitutional right or abuse of statutory requirement has been shown in this case."

To like effect are *Gordon v. Board of Education of the City of Los Angeles*, 78 Cal. App. 2d 464, rev. den. 78 Cal. App. 2d 464, and *Matter of Lewis v. Spaulding*, 193 Misc. 66, app. withdrawn 299 N. Y. 564.

Two years before our decision in the *Lewis* case, it had been "assumed" by the Supreme Court that freedom of speech and of the press, likewise guaranteed by the First Amendment, were protected by the due process clause of the Fourteenth Amendment (*Gitlow v. New York*, 268 U. S. 652, 656), and, while the appellant in the *Lewis* case laid greater stress on Article IX, section 4 (now Art. XI, § 4) of the New York Constitution, he expressly urged in his petition the "violation of the constitutional guarantees of the New York State and the United States Constitution respecting religious liberty and the separation of church and state." Nevertheless we held that the released time program did not breach the so-called "wall of separation" between church and state.

No metaphorical "wall" that mere words can build ever precisely and mathematically delineates a constitutional right. The Supreme Court has recognized, in a religious freedom case, that to "make accommodations between these freedoms" guaranteed by the First Amendment and "an exercise of state authority" is always "delicate" (*Prince v. Commonwealth*, 321 U. S. 158, 165). Such freedoms are not absolute (*Prince v. Commonwealth*, *supra*, at p. 166; *Dennis v. United States*, — U. S. —; *Breard v. Alexandria*, — U. S. —, decided June 4, 1951; *Schenck v. United States*, 249 U. S. 47). Numerous situations involving some incidental benefit to religion have been found constitutionally unexceptionable (see, e. g., *Everson v. Board of Education*, 330 U. S. 1; *Cochran v. Louisiana State Board*, 281 U. S. 370; *Bradfield v. Roberts*, 175 U. S. 291). Tax exemption of church properties (Tax Law, § 4 (6)) is but another of many illustrations, and the practice is universally followed. Very recently, in upholding the Sunday Law, we have recognized that separation of church and state does not mean that every state action remotely connected with religion must be outlawed (*People v. Friedman*, 302 N. Y. 75, app. dismd. for want of a substantial Federal Question, 341 U. S. 907).

It is thus clear beyond cavil that the Constitution does not demand that every friendly gesture between church and state shall be discountenanced. The so-called "wall of separation" may be built so high and so broad as to impair both state and church, as we have come to know them. Indeed, we should convert this "wall", which in our "religious nation" (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 470) is designed as a reasonable line of demarcation between friends, into an "iron curtain" between enemies, were we to strike down this sincere and most scrupulous effort of our State Legislators, the elected representatives of the People, to find an accommodation between constitutional prohibitions and the right of parental control over children. In so doing we should manifest "a governmental hostility to religion" which would be "at war with our national tradition" (*McCullum v. Board of Education*,

supra, at p. 211) and would disregard the basic tenet of constitutional law that

“ . . . the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution” (*Atkin v. Kansas*, 191 U. S. 207, 223) must, of course, be exercised

to protect the constitutional rights of these appellants, it must also be remembered that the First Amendment not only forbids laws “respecting an establishment of religion” but also laws “prohibiting the free exercise thereof”. We must not destroy one in an effort to preserve the other. We cannot, therefore, be unmindful of the constitutional rights of those many parents in our State (we are told that some 200,000 children are enrolled in the released time programs in this jurisdiction, and ten times as many throughout the nation) who participate in and subscribe to such programs. The right of parents to direct the rearing and education of their children, free from any general power of the State to standardize children by forcing them to accept instruction from public school teachers only, is an unquestioned one (*Pierce v. Society of Sisters*, 268 U. S. 510), and, more recently, the nation’s highest tribunal has declared:

“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder” (*Prince v. Commonwealth*, *supra*, at p. 166).

Because the public school must be kept separate and apart from the church, pupils may not constitutionally receive religious instruction therein. All that New York parents ask then is that their children may be excused one hour a week for that purpose. The New York City Board of Education provides more days for secular instruction than required by law (Education Law, § 3204 (4)). The education Law does not fix the number of hours that constitute a

school day. Excuses from attendance are permitted for many good reasons; among others, children are excused from school on holy days set apart by their respective faiths, thus producing a most obvious form of divisiveness, not paralleled in the released time program. Indeed we are all agreed that refusal to excuse children for that reason would be an unconstitutional abridgement of freedom of religion. If it be constitutional to excuse children of a particular faith for entire days for such a religious purpose, it seems clear, by a parity of reasoning, that it is equally constitutional, under the circumstances here presented, to excuse children of whatever faith one hour a week for another and similar religious purpose.

Moreover, parents have the right to educate their children elsewhere than in the public schools, provided the State's minimum requirements are met (Education Law, § 3204; *Pierce v. Society of Sisters*, *supra*), and thus, if they wish, choose a religious or parochial school where religious instruction is freely given. That being so, it follows that parents, who desire to have their children educated in the public schools but to withdraw them therefrom for the limited period of only one hour a week in order to receive religious instruction, may ask the public school for such permission, and the school may constitutionally accede to this parental request. There is nothing in the Constitution commanding that religious instruction may be given on the Sabbath alone, and on no other day.

Appellants assert that in any event triable issues of fact are presented. A basic difficulty with this contention is that appellants now declare that they are prepared to show on a trial matters that have not even been properly pleaded. A great many of their allegations are conclusory in character (*Kelmanash v. Smith*, 291 N. Y. 142, 154), and, as appellants concede, have been lifted bodily from portions of the *McCullum* opinions, without the statement of adequate facts to support them (Civ. Prac. Act, § 1288). As the Appellate Division said, " * * * if the truth of all of the *well-pleaded* allegations of the petition is conceded, petitioners have failed to allege facts sufficient to establish any invasion of

their constitutional rights * * * " (emphasis supplied; 278 App. Div. 573, 575).

Moreover, many of the conclusory allegations show merely a disobedience of the rules and regulations. Such disobedience, while it might warrant the initiation of disciplinary proceedings against any of the offending teachers or principals, would in nowise warrant the relief prayed for, namely, a total discontinuance of the released time program and a rescission of all regulations established by the authorities. It is, of course, possible that a statute and regulations constitutional on their face may be administered in an unconstitutional way (*Snowden v. Hughes*, 321 U. S. 1; *Yick Wo v. Hopkins*, 118 U. S. 356), but in order to invoke this principle it must appear that there is "an element of intentional or purposeful discrimination" by the enforcement authorities (*Snowden v. Hughes*, *supra*, at p. 8). Here there is no allegation in the petition to that effect, and, indeed, even in appellants' brief and in the briefs *amici* supporting their position, "The offer of proof was not an offer to show a pattern of discrimination consciously practiced. * * * " (*People v. Friedman*, *supra*, at p. 81). Under the circumstances, whether the released time program is constitutional is solely a question of law, and the case has been so treated by Special Term as well as by the Appellate Division majority and dissenters.

The order of the Appellate Division should be affirmed, with costs.

LOUGHRAN, Ch. J.: (concurring)

I vote to affirm the order appealed from upon the authority of *People ex rel. Lewis v. Graves* (245 N. Y. 195).

DESMOND, J.: (concurring)

This is a mandamus proceeding (Art. 78, C.P.A.) brought to compel the New York City Board of Education and the State Commissioner of Education, to discontinue and abolish the so-called "released time program" in the City's public schools, on the alleged ground that the release of children from those schools, for one hour a week, at the

request of parents, to attend outside religious instruction in their several faiths, violates the Federal Constitution as to its First Amendment, made applicable to the states by the Fourteenth Amendment. Specifically, it is the contention of petitioners that the program as conducted in New York City, and the state statute and state and local regulations under which it operates, "are violative of the U. S. Constitution within the principles set forth in the *McCollum* decision" that is, *McCollum v. Board of Education*, 333 U. S. 203. I vote for affirmance, because I see no basis for any claim of unconstitutionality.

The First Amendment, which is not quoted at any place in the petition or in the briefs of petitioners and their supporters, forbids the making of laws "respecting an establishment of religion or prohibiting the free exercise thereof". Neither of those prohibitions, in language or meaning, has anything whatever to do with this released time system. The *McCollum* case, *supra*, is not controlling on us here, since the Champaign, Illinois plan, there struck down as unconstitutional, differed from the New York program in a number of important respects, principally in that religious training took place in the classrooms of the Champaign public schools. (One of the "chief reasons" for the decision, says Justice Jackson in a note in the *Kunz* dissent, 340 U. S. at page 311), some public funds were spent in Champaign, the religious teachers there were chosen with the approval of the public school officials, and pupils were, in the Champaign school buildings, solicited for religious instruction. If we are to decide this case on precedent, we must follow our own decision in *People ex rel. Lewis v. Graves*, 245 N. Y. 195, where we upheld, as against claims that it contravened both the Federal and State constitutions, a released time plan identical with the one now before this court. It must be conceded, of course, that there are, scattered through the several lengthy opinions in *McCollum*, expressions which can be read to proscribe all released time programs, including this one. But stare decisis does not mean stare verbis, and until the New York plan, or one just like it, confronts the Supreme Court, there will be no precedent binding on us.

Before turning to a somewhat more thorough discussion of the constitutional question, I mention another separate ground for affirmance. Petitioners are, according to the petition, the mothers of pupils in New York City schools where this plan operates. Their children do not take part in the program but each receives religious instructions at religious schools, outside public school hours. It is indeed difficult to see how the release of other parents' children impinges in any way at all, on any "right" of petitioners. True, they allege that the operation of the released time program "inevitably results" in coercion on parents and children to attend religious instruction, but it is clear that no such "inevitable" result has befallen petitioners or their children. The *Lewis* case in this court (*supra*) can, I suppose, be read as holding that these petitioners, as citizens, have standing to bring this mandamus proceeding, but I suggest the point will bear reinvestigation. It is far fetched to say that petitioners are aggrieved by the continuance of a program which has no effect on them or their children, and which does not involve the use of public buildings, property or funds.

I return to the alleged constitutional question, which needs must be one under the Federal Bill of Rights, since an extra-mural religious education project, just like this one, was expressly held, in the *Lewis* case, *supra*, not to be interdicted by our State Constitution (Art. II, § 4). Our duty then (unhampered by *McCullum* which is not controlling) is to lay the plain facts of this released time system over against the plain words of the First Amendment. The Amendment, lavishly alluded to but seldom quoted, bans, in lucid, specific words, the making of any law "respecting an establishment of religion, or prohibiting the free exercise thereof". The New York released time set-up is authorized by a statute (§ 2210, Education Law) which permits absences from public schools "for religious observance and education", under rules to be established by the State Commissioner. In approving its passage in 1940, Governor Lehman, whose devotion to constitutional liberties needs no encomium, characterized as groundless the fears expressed by some that it "violates principles of our Gov-

ernment" and stated: "The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system". The regulations adopted by the State Education Commissioner, and by respondent New York City Board (taking both sets of regulations together) excuse the absence from school for one hour a week at the close of a daily session of any pupil, whose absence is requested by his parent or guardian for attendance at, and who does attend, a religious education course conducted under the control of one or more duly constituted religious bodies, each such pupil to be registered for the religious course with, and his attendance thereat reported to, the public school authorities, no announcement of any kind relative to the program to be made in the public school, but notification to come to parents from the religious organization only, no comment to be made by any principal or teacher of attendance or non-attendance of any pupil at the religion classes, and no responsibility for attendance thereat to be assumed by the public school but solely by the religious organizations, which, cooperating with parents, must file with the public school principal weekly, a statement of attendance at, or absence from the religion classes, of any pupil enrolled in the latter, with a statement of reasons for absences therefrom. Just where in all that is there "an establishment of religion" or a prohibition of "the free exercise thereof"? Characterization of such a program as "divisive" or "oppressive" or "coercive" is meaningless on a question of constitutional law. What petitioners are saying is that they dislike the whole enterprise, and consider it socially undesirable. Those are predilections, not questions of law.

The basic fundamental here at hazard is not, it should be made clear, any so-called (but non-existent, as I shall try to show) "principle" of complete separation of religion from government. Such a total separation has never existed in America, and none was ever planned or considered by the Founders. The true and real principle that calls for assertion here is that of the right of parents to control the education of their children, so long as they provide them with the state-mandated minimum of secular

learning, and the right of parents to raise and instruct their children in any religion chosen by the parents (*Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390; *Packer v. University*, 298 N.Y. 184, 192). Those are true and absolute rights under natural law, antedating, and superior to, any human constitution or statute.

I cannot believe that the Chief Justice of the United States, in his opinion for the Supreme Court majority in *Dennis v. U. S.* — U.S. —, June 4, 1951, meant, literally, what he wrote: "that there are no absolutes" and that "all concepts are relative". Of course, even the constitutional rights of freedom of speech and freedom of religion are, to a degree, non-absolute, since their disorderly or dangerous exercise may be forbidden by law. But embodied within "freedom of religion" is a right which is absolute and not subject to any governmental interference whatever. Absolute, I insist, is the right to practice one's religion without hindrance, and that necessarily comprehends the right to teach that religion, or have it taught, to one's children. That anything in the United States Constitution means, or could ever be tortured into meaning, that our basic law is violated by an arrangement whereby parents take their own children from the common schools, for one hour a week for instruction in their religion, is beyond my comprehension. As Dean Pound has lately reminded us, our American bills of right "in their significant provisions are bills of liberties" (*New Paths of the Law*, page 7). The New York released time system is a mere method for the exercise of the religious liberties of the parents of public school pupils, and infringes on no rights of anyone, since no one else's rights are in any way affected.

By what process, then, in the teeth of those fundamentals, is an argument contrived for the proposition that this release of children from secular schools for religious education amounts to "an establishment of religion" or "prohibits the free exercise thereof"? The answer is: the argument construes the First Amendment by ignoring its language, its history and its obvious meaning, and by substituting, for its plain wording, and intendment, the

metaphor (Frankfurter, J. in the *McCullum* case, 333 U.S. at page 231) or loose colloquialism of "a wall between Church and state". That the "wall" has never been more than a figure of speech, is clear from the context in which it was first used by Jefferson (see as quoted by Justice Reed in the dissent in *McCullum v. Board*, note at page 245 of 333 U.S.). Quite recently, the Supreme Court itself, in two of its careful opinions in the *Dennis* case, *supra*, has warned us against encasing truth in a "semantic straitjacket" (Chief Justice's opinion) or attempting to decide great constitutional issues by the use of a "sonorous formula" (concurring opinion of Justice Frankfurter). To dispose of this "unbreachable wall" or "impassable gulf" idea, we need only apply here the simple, lucid test proposed by Justice Frankfurter in that same *Dennis* opinion: "not what words did Madison and Franklin use, but what was in their minds which they conveyed?" What was in the minds of the Founders is writ as large and plain as anything on history's pages, and there is not the slightest possible warrant for ascribing to them an intent to interfere (in the guise of a "Bill of Rights"!), with parents' religious indoctrination of their own children.

One of the curiosities of history is the enlarged and distorted meaning currently being given, by some, to the simple phrase of the First Amendment: "an establishment of religion". It must be the rule as to constitutions, just as to statutes, that there is "no occasion for construction" when the phrasing "is entirely free from ambiguity" (*Wright v. United States*, 302 U.S. 583, 589; *Cooley's Const. Limitations*, 8th Ed., Vol. 1, pages 124-126; *Matter of Carey v. Morton*, 277 N.Y. 3661, 3666). The language of a constitution is to be given its ordinary meaning (*Wright v. U. S.*, and *Matter of Carey, supra*). The fundamental purpose in construing it is to ascertain and give effect to the intent of the framers and of the people who adopted it, keeping in mind the objects sought to be accomplished and the evils sought to be prevented or remedied. Under any or all those rules and tests (and they are all one), what is the meaning of "an establishment of religion"?

The Supreme Court itself gave us the answer in *Cantwell v. Connecticut*, 310 U. S. 296, 303: "it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship". "Established" churches were well known to the colonists, who had experienced them in Europe and America. They knew that the phrase meant: "... a State church such as for instance existed in Massachusetts for more than forty years after the adoption of the Constitution" (Corwin, *Constitution and What it Means Today*, 9th Ed., page 155). When the Constitution was adopted there were still established churches in five of the states, and a few years earlier there had been nine of them in the thirteen colonies (Walsh, *Religion and Education under the Constitution*, page 97). "Establishment" of a church or religion always and necessarily means an act of government favoring one particular church or group of churches. Historically, that is exactly what the Amendment meant to the framers of the Constitution and to the Congress and the People who adopted it. Despite all the "historical" gloss, there is one only exposition in the *Annals of Congress* of the meaning, and no contemporary proofs to the contrary. Madison, the author, said during the First Congress that the Amendment mandated (*Annals of Congress* for August 15, 1788): "that Congress should not establish a religion and enforce the legal observance of it by law, nor compel men to worship God in any manner contrary to their conscience". The necessity for the Amendment, he went on to say, was a fear by some that Congress might otherwise have power to "make laws of such a nature as might infringe the rights of conscience, and establish a national religion" and he repeated that the amendment was intended "to prevent these effects". Finally, he noted that the Amendment was being added because "the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would require others to conform". Such fears had indeed been expressed during the campaign to ratify the Constitution as originally drawn (see Van Doren, *The Great Rehearsal*, pages 217 and 237). No one at that time, or for years thereafter, so far as I can discover, ever attributed to the First Amendment any broader

meaning. It is inconceivable that it was ever meant to prohibit governmental encouragement of, or cooperation with, religions generally. As Judge Story pointed out in his Commentaries (5th Ed. Vol. II, page 630) the "general, if not the universal sentiment in America was that Christianity ought to receive encouragement".

I realize that much broader scope may seem to have been accorded to the First Amendment, by the Supreme Court, in the *Everson* (330 U.S. 1) and *McCullum* decisions. But if such a broadening was intended in *McCullum* and *Everson*, it has, I say with respect, no basis in the only history which is pertinent: the history of the drafting and adoption of the Amendment itself. Indeed, that seems to have been conceded by the Justices who were in the majority in the *McCullum* case (see Justice Frankfurter, concurring, at pages 217-220 of 333 U.S.). So experienced and proficient a modern commentator as Charles P. Curtis, says, while approving the *McCullum* holding, that the Court reached its decision without "any justification whatever in what the Constitution says, and even less in what those who wrote it intended it to mean" (Curtis, *Modern Supreme Court*, *Vanderbilt Law Review*, Vol. 4, No. 3, page 438). Indeed, Curtis surmises "that the First Congress would have phrased the First Amendment to exclude the release of school time for religious teaching, if it had then been one of the issues of the day". The surmise is not a particularly daring one, as to those early Americans, nearly all of whose schools were religious in spirit and foundation, and who then, or just before or after, invoked the Deity in their Declaration of Independence, established chaplaincies, expressed their trust in God on their coins, and adopted a national anthem part of which is a prayer to God to "protect us by Thy might". The spirit of those times was that of Washington telling us in his Farewell Address that national morality cannot "prevail in exclusion of religious principle" and Edmund Burke, across the sea, warning that "religion is the basis of civil society, and the source of all good and comfort". Mr. Curtis says that *Everson* and *McCullum* represent judicial work "wise and well done" but his reason for that personal judgment is that he thinks that "such a use of release

time would have a bad effect on our public schools" inculcating a feeling of separatism, etc. Perhaps so, but what has all that to do with the Constitution, and is it anything more than a disguised plea that the Court be allowed to rewrite or amend the Constitution, to accomplish what seems, at the moment and to the incumbents, the better social policy?

Learned writers on law justify this sort of constitutional exegesis, and urge that "a written constitution, which is frequently thought to give rigidity to a system, must provide flexibility if judicial supremacy is to be permitted" (Levi, *An Introduction to Legal Reasoning*, page 42). Rejected by them is the suggestion that "the interpretation ought to remain fixed in order to permit the people through legislative machinery, such as the constitutional convention, or the amending process, to make a change" (Levi, *id.*). The answer, says the same author, is that "a written constitution must be enormously ambiguous in its general provisions." General and sweeping, yes. But not ambiguous. Being a constitution, it should state basic law in broadest outline, available for specific applications as needed. But it cannot, I suggest, be ambiguous and be at the same time a constitution. And, regardless of all this, a particular constitution may use definite, one-shot, one-meaning words, and when such are found, as we find them here in the First Amendment, no process of legal reasoning can make them mean something else, or serve some new and unintended purpose.

Petitioners, lacking support in precedent or history, fall back on assertions that this released time method gives religion "active cooperation" and "aid in obtaining pupils" for the off-campus religious classes. If proof of such cooperation, aid and encouragement could lead to a conclusion of law that the scheme is unconstitutional, then a trial of those allegations would be in order, and the dismissal of the petition below, without a trial, would be wrong. But governmental aid to, and encouragement of, religions generally, as distinguished from establishment or support of separate sects, has never been considered offensive to the American constitutional system. If they are inimical to

our fundamental law, then every President has offended by invoking the Deity in his oath of office, by issuing Thanksgiving proclamations and calling on our people to pray for victory in war, or for peace, or for our soldiers' safety. If petitioners are right, then there is a violation every time a chaplain opens a Congressional session with prayer, or an army bugler sounds "Church call." If petitioners are right, then the Pilgrims were wrong, as was every President who officially urged our people to train themselves in, and practice, religion. Our own State Constitution, on petitioners' theory, offends against American constitutionalism at the point in its preamble where it expresses gratitude "to Almighty God" for our freedom. Petitioners would have this court now deny the declarations of the Supreme Court in the *Holy Trinity Church* cases (143 U. S. 457) and of Chancellor Kent in the *Ruggles* case (8 Johns. 290) in 1811, that ours is a religious nation. I stand on Chancellor Kent's declaration, long ago in the *Ruggles* case, that the Constitution "never meant to withdraw religion in general, and with it the best sanctions of moral and social obligations, from all consideration and notice of the law."

The order should be affirmed, with costs.

FULD, J. (dissenting):

On federal constitutional questions, the Supreme Court of the United States is, of course, the final arbiter, and, concerning the impact of the First Amendment upon religious instruction and the public school, it has recently spoken. That Amendment, the Supreme Court declared, "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. . . . the First Amendment has erected a wall between Church and State which must be kept high and impregnable." (*McCollum v. Board of Education*, 333 U. S. 203, 212.)³ And, because of that principle, the court ruled, the Amendment prevents the passage of any laws "which aid one religion, aid all religions, or prefer one religion over another."

(*McCollum v. Board of Education*, *supra*, 333 U. S. 203, 210; *Everson v. Board of Education*, 330 U. S. 1, 15.)

Drawing authority and direction from section 3210, subdivision 1-b, of the Education Law, as amended in 1940, and rules and regulations promulgated by the New York State Commissioner of Education, the New York City Board of Education has made accommodation for a plan of religious instruction by individual sects for the training of public school students. The instruction is given on public school time but not on public school property. The rules direct that, upon the written request to the school by a parent and a "duly constituted religious body prepared to initiate a program for religious instruction," a child is to be released from his regular classes for such instruction for one hour a week; the public schools are required to maintain records of attendance at these religious courses and of the reasons for absence therefrom. Those children whose parents do not wish them to attend or whose religious sect has not set up a program of instruction in cooperation with the public school's regimen are kept in school to receive what the Superintendent of Schools of the City of New York refers to as "significant education work."

Petitioners challenge that program as a breach of that wall of separation which the First Amendment erected. Their standing is not questioned by respondents and many of the allegations of their petition are not disputed. Petitioners are United States citizens, residents, taxpayers and property owners in Kings County and parents of children attending public schools in the Borough of Brooklyn, New York City, where the "released time" program is in operation. Their children do not utilize it, but they do receive regular religious instruction outside of public school hours at religious schools of their respective faiths—Zorach's child at a Protestant Episcopal religious school and Gluck's children at a Jewish religious school. Asserting that other children attending the public schools are released regularly from attendance for one hour each week on condition that they attend classes for sectarian religious instruction at religious centers, petitioners seek an order directing the

State Commissioner of Education and the Board to discontinue the program and rescind their regulations.

Denied, but deemed admitted for the purposes of this motion to dismiss the petition (see, e. g., *Matter of Hines v. State Board of Parole*, 293 N. Y. 254, 258; *Matter of Schwab v. McElligott*, 282 N. Y. 182, 185-186), are the further allegations of the petition that the Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics "cooperates closely with the public school authorities" in managing the program and in "promoting religious instruction"; that "the system necessarily entails use of the public school machinery and time of public school principals, teachers and administrative staff"; that "the compulsory education system * * * assists and is integrated with the program of sectarian religious instruction carried on by separate religious sects" and that "pupils are released in part from their legal duty to attend school for secular instruction "upon the condition that they attend the religious classes"; that it "has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction"; that it "has resulted and inevitably will result in divisiveness because of difference in religious beliefs and disbeliefs"; and that "limiting" participation in the "program to 'duly constituted religious bodies' effects an unlawful censorship of religion and preference in favor of certain religious sects."

In its present posture, the case before us poses the simple question whether the program just described is infected with the same constitutional infirmity that the United States Supreme Court found in *McColum*. And, though it is ultimately upon the meaning of the First Amendment that the answer to that question depends, we are no longer free since the *McColum* decision to place our own meaning or gloss upon that Amendment, but must read it as has the Supreme Court.

While the Champaign "released time" system which was condemned in that case differed in details from that complained of herein, the court's conclusion and the principles

which it enunciated are broad in scope and clearly reach far beyond the precise fact situation there presented.

Regarding the conclusion, there may be room for argument as to which phrase, torn from context, best reflects the sense to be distilled from the several opinions written, but, respecting the net result, there can be no doubt whatsoever. Mr. Justice Reed, dissenting alone, recorded the common ground and ultimate conclusion of his brethren's opinions with the statement (333 U. S., at p. 240):

"From the tenor of the opinions I conclude * * * that any use of a pupil's time, *whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance*, falls under the ban." (Emphasis supplied.)

Regarding the principles enunciated, the first tenet is that there be a wall "high and impregnable" between Church and State and that the State maintain a strict neutrality, neither suppressing nor sustaining religion. Speaking for a majority of six judges, Mr. Justice Black wrote (333 U. S., at pp. 210-211):

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. * * * In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state'."

That wall was breached by adoption of the released time program in Champaign, according to the court, since by it the state effectively aided religions in two respects—(1) by making the public school buildings available and (2) by providing pupils for this or that sect's religious classes. Mr. Justice Black phrased it in this way (pp. 209-210, 212):

"Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the

tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment. (pp. 209-210)

"Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State (p. 212)."

Not only by direct command, but also by the pressures inherent in the functioning of the program did the Champaign system effect a breach of the wall. In the words of Mr. Justice Frankfurter, concurring,

"The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. . . . That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend." (p. 227).

It is not that the First Amendment begrudges the use of forty-five or sixty minutes of the school day for religious instruction that condemns the Champaign program, but rather the utilization by state authority of the "momentum of the whole school atmosphere and school planning" behind released time:

"If it were merely a question of enabling a child to obtain religious instruction with a receptive mind, the thirty or forty-five minutes could readily be found on Saturday or Sunday. If that were all, Champaign

might have drawn upon the French system, known in its American manifestation as 'dismissed time,' whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school. The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning. To speak of 'released time' as being only half or three quarters of an hour is to draw a thread from a fabric" (pp. 230-231).

The pleadings in the record before us make plain the use of the public school machinery, its atmosphere and its momentum. The vice in the use of the state's compulsory public school machinery to provide pupils for the religious classes is as predominant a factor in the present case as it was in *McColum*. (333 U. S., at p. 212.) There is no denying that the program enables religious denominations to divert to sectarian instruction pupils assembled, and time set aside, for secular education by the state's compulsory attendance laws. Moreover, while it is true that the regulations prohibit comment on a pupil's failure to attend the religious classes, the program itself seems bound to exert certain inherent pressures on the pupils to attend. For one thing, the natural tendency of pupils to conform to the practices of fellow students cannot be discounted (333 U. S., at p. 227). In addition, the release from the obligation to attend class for the one hour a week is unquestionably an inducement to register for such courses, on condition that pupils attend the religious classes for, it has been observed, religious instruction can compete more successfully with arithmetic than with recreation.

The cooperation of the public school system further serves to assure the attendance at the religious classes of the pupils released for that purpose. Thus, the regulations require that "Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week," together with a statement of the reason for any absence. The knowledge that an official record is kept

of his attendance necessarily places pressure on the child—accustomed as he is to the discipline of school—to attend these religious classes. The vitality of the system lies in the prestige, planning, cooperation and assistance lent by the public school system, which is exactly that fusion and integration of state and religion prohibited by the First Amendment as read by the Supreme Court. Thus, even if we assume that no public school funds and that but little of the time of public school employees are devoted to the program, it violates the Constitution.

And, as was true of the Champaign system, so here, the program is necessarily divisive in its effect. As Justice Frankfurter forcefully noted in *McCullum*:

“Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages (pp. 227-228).

Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by

religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice (pp. 216-217)."

Present a program where some children are released from their usual attendance at public school on condition that they attend courses in religious observance and education under the control of duly constituted religious bodies, it cannot matter, insofar as the impact of the First Amendment is concerned, that such religious instruction is given off the school grounds. What is vital and operative is, not where the religious teaching is given, but that it is given at all through the instrumentality of the state or through the machinery or momentum of the public school system. No one disputes the power of the legislature to shorten the school day so as to afford greater opportunity for week-day religious instruction but that grant, that opportunity, must not be mingled with such coercion to attend as is derived from employment of the compulsory attendance laws and the public school.

In sum, then, what the First Amendment forbids is the fusing, through state action, of the secular and the sectarian in the field of public education. The circumstance that any sect may participate in the program is immaterial. It is not discrimination alone that the Constitution prohibits; as the Supreme Court made exceedingly clear, neither the state nor its public schools may be used to "aid one religion, aid all religions, or prefer one religion over another." (*McCullum v. Board of Education*, *supra*, 333 U. S. 203, 210-211.)

I perceive no merit in the contention for which *Pierce v. Society of Sisters*, 268 U. S. 510, is cited—that a challenge to the released time program is a challenge to the right of parents to control the rearing and education of their children. More specifically, it is urged that, if a parent may insist upon the "release" of a child from any attendance at a public school so as to permit him to attend a parochial school, the parent has, *a fortiori*, a right to

insist on the release of the child for but a small percentage of school time.

The argument goes too far. If valid, it would lead to the conclusion that, even though the child attends a public school, the parent would have a constitutional right to remove him therefrom at any time and for any period in order to have him instructed in sectarian religious courses. If that were so, then the released time program would be unconstitutional for a reason wholly different from that asserted: it would impinge on a parent's "constitutional right", by limiting the religious instruction to an hour and by requiring attendance at the public school for the balance of the day. The *Pierce* case stands for no such proposition. The Supreme Court there held only that the state could not constitutionally prevent parents from determining for themselves where their children shall be educated and whether that education shall be sectarian or non-sectarian. No one questions the right of parents to send their children to private or parochial schools of their own choosing. What the *McColum* case concerned itself with, and what is here involved, is not the right of a parent, but rather the power of the state. The *McColum* case, as we have noted, invokes the doctrine of separation, not against the parent's right, but against the state's power, and holds that the state may not commingle a program of religious instruction with the secular education given in its public schools. Nothing in the *Pierce* case either negates that doctrine or suggests a contrary conclusion.

It may well be that there are children growing up untutored in matters religious and, if that be so, it is a matter for grave concern. Considerations of fundamental principle, however, are involved when an attempt is made to cure that lack through the instrumentality of the public school. Our constitutional policy, it has been said,

"does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular

intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the (First) Amendment itself.

"It is not because religious teaching does not promote the public or the individual's welfare, but because neither is furthered when the state promotes religious education, that the Constitution forbids it to do so." (Rutledge, J., dissenting in *Everson v. Board of Education*, *supra*, 330 U. S., at p. 52.)

Nor may the released time program be justified as merely another application of the immemorial and unchallenged practice of releasing children from school attendance to permit them to observe their religious Holy Days. To treat them as similar is to confuse two entirely different and distinct matters. Religious observance of Holy Days necessarily requires attendance at church or temple at stated times which may coincide with the hours otherwise specified by law for school attendance. To refuse to excuse children for such religious observance would be a restraint of that freedom of religion, and interference with that liberty of worship, which the Constitution guarantees. (Cf. *Board of Education v. Barnette*, 319 U. S. 624, 637, 642, 646.) Obviously, no such issue is here involved.

People ex rel. Lewis v. Graves, 245 N. Y. 195, upon which respondents heavily rely, did involve a scheme for released time for religious instruction somewhat similar to the one before us: on the written request of the parent alone—and not, as in this case, by a clergyman as well—the child was released for a half hour a week of what would normally have been a study session at school. However, in view of the Supreme Court's interpretation in the *McColum* case of the controlling First Amendment—quite apart from other Supreme Court decisions definitively establishing that that Amendment applies to the states (see *Everson v. Board of Education*, *supra*, 330 U. S. 1; *Murdock v. Pennsylvania*, 319 U. S. 105; *Hamilton v. Regents*, 293 U. S. 245,

265).—the *Lewis* case can no longer be deemed decisive, and no useful purpose is served by considering whether an appraisal of the factual differences between the New York City program and the White Plains program in the *Lewis* case would make the *Lewis* decision inapplicable even under the State Constitution.

Time has taught, and the Supreme Court, by its decision in *McCollum* has reaffirmed, the wisdom and necessity of maintaining "a wall . . . high and impregnable" between Church and state, between public school secular education and religious observance and teaching. Maintenance of that barrier was believed by the Supreme Court, as earlier it had been by the Founding Fathers, not as a demonstration of hostility to religion, but rather as a means of assuring complete freedom of religious worship. Whether the released time program in New York City breaches that barrier is the only issue before us. I believe that it does.

It is impossible to justify the determination made below that the petition be dismissed for insufficiency. At the very least, there should be a trial to permit development of such allegations as those that assert the "close cooperation" between public school authorities and those conducting the classes in religious instruction; the use of public school machinery and the time of public school personnel "necessarily entailed" by the program; the "exercise of pressure and coercion" upon parents and children to secure attendance of children at such classes; the divisive nature of the program; "certain religious sects." However, as I have already indicated, I believe that, on the basis of statute, regulations and the admitted allegations of the petition, petitioners are entitled to a decision, on the pleadings, that the released time program under consideration falls within the ban of the Federal Constitution.

Accordingly, I would reverse and direct entry of a final order granting the relief sought in the petition.

Order affirmed with costs

Opinion by Froessel, J., in which Lewis, Conway and Dye, JJ., concur.

Loughran, Ch. J., concurs for affirmance upon the authority of *People ex rel. Lewis v. Graves*, 245 N. Y. 195.

Desmond, J., concurs for affirmance in separate opinion.

Fuld, J., dissents in opinion.

EXHIBIT "B"

Opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department

(278 App. Div. 573; 103 N. Y. S. 2nd 27; Jan. 15, 1951)

Matter of Zorach and ano., pet-ap (Clauson, Jr., &c., res)—In a proceeding pursuant to article 78 of the Civil Practice Act, petitioners' appeal from a final order dated June 23, 1950, which (1) denied petitioners' motion for an order directing a trial in respect to issues of fact; (2) granted the motion of the intervenor-respondent for a final order dismissing the proceedings on the merits on the ground that the petition failed to state facts sufficient to constitute a cause of action; (3) sustained the objections of respondents in point of law to the petition; and (4) denied petitioners' application in all respects and dismissed their petition on the merits as a matter of law. The purpose of the proceeding was to obtain an order, directed to respondent Board of Education and respondent Commissioner of Education, to discontinue the program of released time for religious education in practice in New York City and to rescind the regulations promulgated by both respondents respecting and authorizing such released time program.

Section 3210, subdivision 1-b, of the Education Law provides that absence from attendance upon instruction, as required by that statute, shall be permitted for religious observance and education, under rules that the Commissioner of Education shall establish. Pursuant to such statutory authority, respondent Spaulding, as Commissioner of Education, established the following regulations:

"1. Absence of a pupil from school during hours for religious observance and education to be had outside the

school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil. 2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies. 3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities. 4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week. 5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities. 6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Thereafter, respondent Board of Education, purporting to act in accordance with the regulations adopted by the Commissioner of Education, established the following regulations: "1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program. 2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose. 3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor. 4. Upon the presentation of a proper request as above prescribed pupils of any grade will be dismissed from school

for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough. 5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals. 6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Petitioners contended, for reasons set forth in their petition, that the regulations so established and the operation thereunder of the "released time program" in New York City, pursuant thereto, prohibited the free exercise of religion in violation of the First and Fourteenth Amendments of the United States Constitution, and section 3, article 1 of the Constitution of the State of New York, and that section 3210 of the Education Law, if construed to authorize the establishment of such regulations and the operation of the released time program thereunder as described in their petition, was also unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution.

Order affirmed, with one bill of \$10 costs and disbursements to respondents and intervenor-respondent.

Subdivision 1-b of section 3210 of the Education Law, which merely provides that absence from attendance on required instruction shall be permitted for the specified religious purposes under rules to be established, is in no way unconstitutional. Moreover, if the truth of all of the well pleaded allegations of the petition is conceded, petitioners have failed to allege facts sufficient to establish any invasion of their constitutional rights by the adoption of the regulations complained of, or the operation thereunder of the "released time program" (cf. *People ex rel. Lewis v. Graves*, 245 N. Y., 195; *Matter of Lewis v. Spaulding*, 193 Misc., 66). *McCullum v. Board of Education* (333 U. S. 203), which may be readily distinguished on its facts does not require a contrary determination.

Nolan, P. J., Carswell and Sneed, J.J., concur.

Adel, J., dissents and votes to reverse the order and to

grant the motion of petitioners for the relief demanded in the petition, with the following memorandum: The program described in the regulations adopted under section 3210, subdivision 1-b, of the Education Law, and which admittedly is in operation in New York City, is in violation of the constitutional requirement for separation of church and state. (*McCollum v. Board of Education*, 333 U. S., 203).

The elements of the program operated in Champaign, Ill., are factually different from those in the New York City program, in suit, but the difference in facts requires no different holding. The New York City program is void in that it is integrated with the state's compulsory education system, which assists the program of religious instruction carried on by separate religious sects; in that it releases pupils, who are compelled to attend public schools for secular education, from part of their legal duty upon condition that they attend religious classes; and in that the state's compulsory public school machinery is used to afford aid and assistance to sectarian groups by helping provide pupils for religious classes. Wenzel, J., concurs with Adel, J.

EXHIBIT "C"

Opinion of Special Term, Supreme Court of the State of
New York, Kings County

(198 Misc. 631; 99 N. Y. S. (2d) 339; June 19, 1950)

By Mr. JUSTICE DiGIOVANNA:

Matter of Zorach et al. (Clauson, Jr., et al.)—This is an application pursuant to article 78 of the Civil Practice Act for the following relief: 1. Directing a trial in respect of issues of fact raised by the pleadings and accompanying papers; 2. The hearing of any objections in point of law in relation to the pleadings; 3. Argument upon the merits of petitioners' application, and 4. Such other and further relief as may be just and proper.

The petitioners allege that they are citizens, taxpayers and parents of children attending public elementary schools in the Borough of Brooklyn, City of New York. The re-

spondents are the Board of Education of the City of New York, the Commissioner of Education of the State of New York, and The Greater New York Co-ordinating Committee on Released Time of Jews, Protestants and Roman Catholics, as intervenor respondent.

The objective sought by this proceeding is to review the determination of the Board of Education of the City of New York and the State Commissioner of Education in establishing what is commonly known as the "released time program" of religious instruction now in practice in the public schools of this city and elsewhere throughout this state with the ultimate aim of compelling the discontinuance of this program. Varying practices having developed in "released time programs," in order to insure uniformity and legality, the Legislature of the State of New York enacted chapter 305 of the Laws of 1940, amending Education Law 625 (now Education Law, sec. 3210) by adding thereto the following sentence: "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

It is enlightening to quote, at this point the memorandum handed down by Governor Lehman when he signed this bill, which reads as follows: "Under this bill the State Commissioner of Education shall establish rules under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education. For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: 'Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agent of the State authorized or charged with the responsibility of adopting rules under which absences for

religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules. A few people have given voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

To effectuate this legislation, the State Commissioner of Education on July 4, 1940, issued the following regulations which, as amended, are "1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil. 2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies. 3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities. 4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week. 5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities. 6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

Thereafter, on November 13, 1940, the Board of Education of the City of New York promulgated the following rules and regulations which are presently in full force and effect: "1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program. 2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil

a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose. Religious organizations, in co-operation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor. 4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough. 5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals. 6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Since the release of any child for one hour a week for religious instruction is at the option of the parents of the child, the parent who desires to have his or her child so released is required to fill out a card, the form of which is as follows:

"Registration For Released Time Religious Instruction.
 New York City. 194 . To
 Principal of (School). Please excuse
 my child, of grade
 one hour weekly on throughout the rest
 of this school year, beginning 1 to go for
 religious instruction at
 (Name of Center to which child is to go). (a)
 (Signature of parent or guardian). Address
 Phone (b) Provision has
 been made to accommodate and instruct this pupil.
 (Signature of Clergyman). (Card
 to be retained and filed by the Public School). RS-1."

Such registration cards are prepared and distributed either by the intervenor-respondent, an organization wholly independent of the school system, or by a particular religious organization. No member or employee of either of the other respondents participates in any way in the distribution of the cards, the distribution taking place entirely outside of school premises. No expense of this program is borne directly or indirectly by either of the other respondents. When the card has been filed in the school by the parent and the principal has notified the teacher that the pupil shall be released at 2 P.M. on the designated day for religious instruction then, without further announcement by the teacher, the child may leave the class and school grounds at the designated time and proceed immediately to the location specified on the card for religious instruction.

Education is a process for the mental, physical and moral development of human beings. Throughout history, man has sought some form of religious worship as an influence toward his moral development. The fundamental idea of a Supreme Being requiring worship has become inbred in the mind of man. The idea of worship in varying forms has prevailed in the minds and hearts of man throughout the ages. Formal religions too numerous and antithetical to be reconcilable, have arisen and flourished; their followers even became mortal enemies because of discord created by diversity of religious beliefs.

When the founding fathers of this country set about their task of adopting an organic law for this new nation, they did not deny the value of religion, but wisely determined that all creeds could live together more harmoniously if no creed was given preference. Therefore, in this country there has been developed a formal separation of church and state, which does not deny the value of any formal religion, but is per se, a guarantee of freedom of worship.

Recognition of the value of religious instruction as an educational contribution to the moral development of man began to take definite shape in this jurisdiction about a quarter of a century ago and has developed into the "released time program." "What more logical advance could be made in the science of sociology than the unification of

religious leaders in a coordinated effort to teach children faith and morality—and for that purpose to excuse them from schools for one hour a week to go to the church or tabernacle or synagogue of their parents' choice?" (*Gordon v. Board of Education*, 78 Cal., App. Reports [2d Series], 464, 474).

The petitioners labor under the same misconception as did the petitioners in the case quoted immediately above and their concepts were criticized and rejected in the following language: "Throughout her entire argument, appellant misconceives the American principle of religious freedom. What she contends for is freedom *from* religion rather than freedom *of* religion. Appellants' argument leads one to the conclusion that the doctrine of separation of church and state looks upon religion as something intrinsically evil, and against which there should be a rigid quarantine. Nothing is farther from the true concept of the American philosophy of government than such an argument. In the constitution of every state of the union is to be found language which either directly, or by clear implication, recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the wellbeing of the community" (*Gordon v. Board of Education of the City of Los Angeles*, *supra*, p. 476). The lines immediately following cite the preamble to the Constitution of the State of California which is almost exactly the wording of the preamble to the Constitution of the State of New York, which latter reads as follows: "We, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, Do Establish This Constitution."

It is in recognition of this principle that separation of church and state has never meant freedom *from* religion but rather freedom *of* religion.

To permit restraint upon state and local educational agencies which are lawfully authorized to grant released time to our young citizens who wish to take religious instruction would constitute a suppression of this right "of" religious freedom. It is tantamount to a denial of a basic right guaranteed by the letter and the spirit of our Ameri-

can concept of government. It would be a step in the direction of and be consonant with totalitarian and communistic philosophies existing in jurisdictions wherein atheism and the suppression of all religions are preferred to the freedom of the individual to seek religious instruction and worship. Such would be the result or conclusion if the relief sought herein by the petitioners was to be granted.

"Released time programs" have been the subjects of judicial review in many jurisdictions within this country for two and one-half decades. Among the first of these cases was involved the test of a plan used in White Plains, New York, which seems to have been identical with that here attacked. That plan was held constitutional in the Supreme Court at Special Term, in the Appellate Division and in the Court of Appeals without a single dissent: "Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. As a matter of educational policy, the Commissioner doubtless may make proper regulations to restrict the local authorities when the administration of the plan of week-day instruction in religion or any plan of outside instruction in lay subjects in his judgment interferes unduly with the regular work of the school." (*People ex rel. Lewis v. Graves*, 245 N. Y., 195, 198).

Subsequent to the decision of the Supreme Court of the United States in *McCullum v. Board of Education* (333 U. S. 203), another proceeding under article 78, C. P. A., was initiated in an attack upon this program (*Matter of Lewis v. Spalding*, 193 Misc. 66, appeal withdrawn 299 N. Y. 564). In that proceeding the relief sought was (1) to discontinue the practice of releasing children from regular school attendance, permitting them to receive religious instruction, (2) to discontinue the existing rules or regulations providing therefor and (3) restraining the adoption of such rules or regulations in the future. The demands therein sought a peremptory order, which was denied; in the instant case, there is in effect a restatement of demands calculated to raise issues of fact. The paramount legal question in the aforesaid case, namely, the constitutionality of the statute and regulations, having been determined adversely to the

petitioner therein, a similar determination must be reached herein.

The program in operation in the City and State of New York is radically dissimilar from the Champaign Plan, which the United States Supreme Court, in the *McCormick* case, declared to be unconstitutional: the differences may be illustrated best by setting in apposition distinctive features of both.

Champaign Plan

1. No underlying enabling State statute.
2. Religious training took place in the school buildings and on school property.
3. The place for instruction was designated by school officials.
4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils.

New York City Plan

1. Education Law § 3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish".
2. Religious training takes place outside of the school building and off school property.
3. The place for instruction is designated by the religious organization in cooperation with the parent.
4. No element of segregation is present.

Champaign Plan

5. School officials supervised and approved the religious teacher.

Champaign Plan

6. Pupils were solicited in school buildings for religious instruction.
7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds.
8. Non-attending pupils isolated or removed to another room.

New York City Plan

5. No supervision or approval of religious teachers or course of instruction by school officials.

New York City Plan

6. School officials do not solicit or recruit pupils for religious instruction.
7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved.
8. Non-attending pupils stay in their regular classrooms continuing significant educational work.
9. No credit given for attendance at the religious classes.
10. No compulsion by school authorities with respect to attendance or truancy.
11. No promotion or publicizing of the released time program by school officials.
12. No public moneys are used.

Section 3210 of the Education Law, as implemented by the respective regulations of the state commissioner and the board of education, is objected to by the petitioners herein

as unconstitutional. In *Everson v. Board of Education* (330 U. S., 1, 16) we are reminded: " . . . we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power." In the same case (pp. 15-16) it is stated that: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

The recent and much-quoted decision of the Supreme Court of the United States in *McCollum v. Board of Education* (supra), which declared unconstitutional the so-called Champaign Plan, was arrived at on the facts of that case. In so doing, Mr. Justice Frankfurter expressly stated (p. 226): "The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied." And again (p. 227), the same justice said: "Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects."

In the very opinion holding the Champaign Plan unconstitutional, Mr. Justice Frankfurter further said (p. 230): "If that were all, Champaign might have drawn upon the French system, known in its American manifestation as 'dismissed time,' whereby one school day is shortened to

allow all children to go where they please, leaving those who so desire to go to a religious school."

As a further indication that the plan before this court is consistent with this judicial reasoning, the same court said (p. 231): "We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program. We find that the basic Constitutional principle of absolute Separation was violated when the State of Illinois, speaking through its Supreme Court sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement."

In discussing the objection that a child whose parents do not choose for him any form of religious instruction may be classed as a dissenter and thereby humiliated, Mr. Justice Jackson, in his concurring opinion, said in the same case (p. 233): "Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends non-conformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground." Coinciding with the views of Mr. Justice Frankfurter, Mr. Justice Jackson in the same case continued (p. 237): "The opinions in this case show that public educational authorities have evolved a considerable variety of practices in dealing with the religious problem. Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce

different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error." In what amounts to a summation of the entire proposition involving voluntary religious instruction, in the same opinion, Mr. Justice Jackson said (p. 235): "To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. Authorities list 256 separate and substantial religious bodies to exist in the continental United States. Each of them, through the suit of some discontented but unpenalized and untaxed representative, has as good a right as this plaintiff to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits."

A careful analysis of the *McCollum* case leads this court to hold that the present "released time" program contains none of the objectionable features of the plan in that case which was the basis of the decision in the Supreme Court of the United States holding the plan to be unconstitutional. The subsequent decision of the courts in this state in *Matter of Lewis v. Spalding* (supra) is clearly determinative of the constitutionality of the plan under attack.

The petitioners have, in this proceeding adopted a different prayer for relief from that sought in *Matter of Lewis v. Spalding* (supra). While continuing to attack the constitutionality of the statute and regulations involved, they seek a direction for discontinuance of the regulations on a generalized allegation of maladministration in particular instances, of which no particulars are cited.

However, the practice or practices which may grow up in

the matter of administrative details do not affect the constitutionality of the statute involved, for the statute must stand or fall by itself on this question.

The attorney for the petitioners, in his memorandum relative to the merits of the petitioner's application and the legal sufficiency of the petition says (p. 9): "It is submitted that it is not the details of a particular released time program which render it violative of the First Amendment; it is the basic concept—the *raison d'être* of the program, which causes it to run afoul of the Amendment as interpreted in the *Everson* and *McColum* decisions." However, the majority opinions of Mr. Justice Frankfurter and Mr. Justice Jackson quoted above seem to directly negate this assertion.

In the face of a holding that the statute attacked is constitutional, we next come to the question of whether triable issues are presented. What are the issues raised by this proceeding other than the question of constitutionality? There are no degrees of constitutionality. Neither does compliance with the statute render it constitutional if it is unconstitutional, nor does administrative error render it unconstitutional if it is constitutional. It may be, conceivably, that in isolated cases a particular teacher will fail to conform to the regulatory mandates imposed by the respondents, but if such be the case, the remedy is not the invalidation of valid statute but the imposition of a disciplinary penalty upon the violator. To prevent or redress particular instances of maladministration, ample machinery of law exists. However, that is not an issue in this special proceeding because no record has been presented of an arbitrary or capricious ruling by the respondents respecting any particular act of maladministration. This court cannot agree, therefore, with the argument of counsel for the petitioners that it has before it the question of whether or not the program is being conducted in accordance with the regulations. Indeed, there is no proof that it is not while there is proof, immaterial to this special proceeding, that it is being so conducted in the particular schools attended by the children of these petitioners. In fact the attorney for the petitioners, in the citation from his brief above

quoted, concedes that fact. The question validly presented by this proceeding is solely addressed to the constitutionality of the statute and regulations.

Previous motions made and determined by other justices of this court have been in no sense determinative of the issues raised in this proceeding. Mr. Justice Beldock, and the Appellate Division (275 App. Div. 774) distinctly stated that their respective decisions determined only the proper venue. Similarly, neither Mr. Justice Walsh (195 Misc. 531 & 534), nor Mr. Justice Hearn made any determination that the petition was immune from attack at this time. As a matter of fact, The Greater New York Co-ordinating Committee only became a party to this proceeding by permission of Mr. Justice Walsh and the cross-motion of the said intervenor in this proceeding must be considered timely.

From the above, it follows that the first prayer for relief of the petitioners, namely, that a trial be directed of the respective issues of fact raised by the pleadings and accompanying papers, must be denied because no issues exist. The second prayer for the hearing of objections in point of law in relation to the pleadings, has been disposed of by way of lengthy oral argument before this court and submission of voluminous briefs by all the interested parties. The third prayer, that argument be had on the merits of petitioners' application, has been disposed of in the same manner. The court finds that assuming all of the facts set forth in the petition are deemed to be true, nothing has been shown to warrant a finding that section 3210 of the Education Law is unconstitutional or that the regulations adopted by the respondents as required by section 3210, are arbitrary or capricious or unreasonable in law or in fact.

The cross-motion of the intervenor-respondent, is granted. The objections of all respondents in point of law to the petition are sustained and the petition is dismissed on the merits as a matter of law.

Submit final order.

EXHIBIT "D"

Opinion of Special Term, Supreme Court of the State of New York, Kings County, on Denial of Motion for Re-argument

(New York Law Journal, August 23, 1950 at p. 299)

By Mr. JUSTICE DIGIOVANNA:

This is a motion for a reargument of a motion heretofore decided by this court which sought to have declared unconstitutional the "released time" program for religious instruction now in effect in the public elementary schools of this city, and as an alternative request seeking the trial of issues allegedly raised by the petition and answering affidavits.

Reargument is sought on two grounds. The first is that the court overlooked the binding effect of the opinion of Mr. Justice Black in *People ex rel. McCollum v. Board of Education* (333 U. S., 203). This court, it is true, quoted excerpts from the concurring opinion of Mr. Justice Frankfurter, who was one of the majority justices, as this court might properly do, to show the reasoning of various members of the court, and specifically to show a rational distinction between the Champaign plan there considered and the plan challenged herein. Furthermore, a court of concurrent jurisdiction in this state has spoken since the decision in the *McCollum* case upholding the constitutionality of a similar program (*Matter of Lewis v. Spalding*, 193 Misc., 66, appeal withdrawn 299 N. Y., 564). Furthermore, the Court of Appeals of this state earlier upheld a similar plan in *People ex rel. Lewis v. Graves* (245 N. Y., 195). This court must reaffirm its determination of constitutionality on the basis of the above decisions and hold to its distinction between the New York and the Champaign plans.

The second ground on which reargument is sought is that the court misinterpreted the factual theory of petitioners' proceeding. In support of this motion for reargument there have been submitted one conclusory affidavit of the attorney for the petitioners, one affidavit of a former

principal, four affidavits of *former* teachers, three affidavits from parents and three from former pupils. These affidavits outline what might be termed, administrative difficulties.

The moving papers on this motion have been duly considered by this court in arriving at its determination herein, even though such reargument must normally be based upon the papers submitted upon the original motion (*Hauser v. Herzog*, 141 App. Div., 522, 524; *Matter of Hooker*, 173 Misc., 515, 517).

Reargument should not be granted unless it is shown that some question decisive of the case and duly submitted by counsel has been overlooked (*Mount v. Mitchell*, 32 N. Y., 702; *Fosdick v. Hempstead*, 126 N. Y., 651; *Matter of Palmer*, 193 Misc., 411). Nor may it be granted upon an additional showing of facts unless such facts occurred since the making of the original motion or permission to present such additional facts has been granted (*Haskell v. Moran*, 117 App. Div., 251, 252; *De Lacy v. Kelly*, 147 App. Div., 37, 38).

Neither do the moving papers herein cite any contradictory decision of a higher court rendered subsequently to the decision of this court (*Hand v. Rogers*, 16 Misc., 364) nor that any controlling decision exists to which the attention of this court has not heretofore been called (*Coleman v. Livingston*, 45 How. Pr., 483).

The moving papers herein show no valid reason for granting leave to reargue, but seem to be rather a plea to be allowed to renew the original motion upon additional facts not newly discovered.

The motion for leave to reargue is denied.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.

FILED

JAN 23 1952

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951

No. 431

In the Matter of the Application of

TESSIM ZORACH and ESTA GLUCK,

Appellants,

for an order pursuant to Article 78 of the
Civil Practice Act,

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY
CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE and
JAMES MARSHALL, constituting the Board of Education
of the City of New York, and FRANCIS T. SPAULDING,
Commissioner of Education of the State of New York,
directing them to discontinue certain school practices,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON
RELEASED TIME OF JEWS, PROTESTANTS and ROMAN
CATHOLICS,

Intervenor.

APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

BRIEF FOR APPELLANTS

KENNETH W. GREENAWALT,
Counsel for Appellants.

LEO PFEFFER,
EDWIN J. LUKAS,
SOL RABKIN,
Of Counsel.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
THE STATUTE, REGULATIONS AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	6
(a) Nature of Appeal and Proceeding	6
(b) The Petition and Other Pleadings and Accompanying Papers	7
(c) Prior Proceedings	12
(d) The New York Practice	13
SPECIFICATION OF ASSIGNED ERRORS TO BE URGED	15
THE NATURE OF APPELLANTS' OPPOSITION TO RELEASED TIME	21
SUMMARY OF ARGUMENT	25
ARGUMENT:	
POINT I—Systems of released time such as that authorized by the New York Statute and Regulations were considered, passed upon and ruled invalid by this Court in the <i>McCollum</i> case	27
A. The <i>McCollum</i> Decision	28
B. The Opinion of the Court in the <i>McCollum</i> Case	29
C. The Concurring Opinion of Mr. Justice Frankfurter	35
D. The Dissenting Opinion of Mr. Justice Reed...	38

POINT II—The meaning of the First Amendment stated in the <i>Everson</i> case and reiterated in the <i>McCullum</i> case requires invalidation of the New York released time program even if all of the specific details of that program were not passed upon and decided in the <i>McCullum</i> case	40
A. Preferring One Religion	41
B. Aiding All Religions	43
C. Forcing or Influencing Profession of Belief....	44
D. Tax Support of Religious Activities	49
E. Governmental Participation In Religious Affairs and Vice Versa	51
POINT III—No adequate reason has been presented for this Court to repudiate its interpretation of the First Amendment in the <i>Everson</i> and <i>McCullum</i> cases	53
A. The Deep Roots of the Separation Principle	56
B. The Effect of Separation on Religion	58
C. The Proposed Distortion of the First Amendment	59
POINT IV—Invalidation of the released time system would not interfere with freedom of religion nor would it constitute an overruling of <i>Pierce v. Society of Sisters</i>	62
POINT V—Even if appellants were not entitled to a judgment on the pleadings, the New York courts erred in denying appellants the opportunity to prove by a trial of the facts that the actual operation of the program necessarily violates constitutional prohibitions	65
A. The Theory of the Petition	66
B. The Factual Assumptions Made by the Court Below	68

	PAGE
C. The Constitutional Function of a Trial in This Case	73
CONCLUSION	78
APPENDIX—Relevant Provisions of New York Education Law, Art. 65, Part I, "Compulsory Education"	81

Citations

Cases:

<i>Balaza v. Board of Education of St. Louis</i> (#18369, Div. No. 3, May 25, 1945) quoted in <i>Butts, The American Tradition in Religion and Education</i> (1950)	34
<i>Busch Jewelry Co. v. United Retail Employees' Union</i> , 281 N. Y. 150 (1939)	77
<i>Cantwell v. Connecticut</i> , 311 U. S. 296 (1940)	42
<i>Chambers v. Florida</i> , 309 U. S. 227 (1940)	66
<i>County of Milwaukee v. Carter</i> , 258 Wis. 139 (1950)	34
<i>Dyer v. Broadway Central Bank</i> , 252 N. Y. 430 (1930)	75
<i>Everson v. Board of Education</i> , 330 U. S. 1 (1947)	25, 26, 29, 35, 36, 37, 40-1, 44, 51-59
<i>Harfst v. Hoegen</i> , 349 Mo. 808 (1941)	50
<i>Hines v. State Board of Parole, Matter of</i> , 293 N. Y. 254 (1944)	14, 15, 75
<i>Illinois ex rel. McCollum v. Board of Education</i> , 333 U. S. 203 (1948)	11, 16-20, 22, 23, 25-43, 46, 48, 52-56 64, 65, 67, 73-5, 78
<i>Kaplan v. Independent School District of Virginia</i> , 171 Minn. 142 (1927)	47
<i>Knowlton v. Baumhover</i> , 182 Iowa 691 (1918)	47
<i>Massachusetts v. Mellon</i> , 262 U. S. 447 (1923)	50
<i>Milk Wagon Drivers Union v. Meadowmoor Dairies</i> , 312 U. S. 287 (1941)	77

<i>People ex rel. Latimer v. Board of Education</i> , 394 Ill. 228 (1946)	34, 35
<i>People ex rel. Lewis v. Graves</i> , 245 N. Y. 195	17, 32, 35
<i>People ex rel. Ring v. Board of Education</i> , 245 Ill. 334 (1910)	46
<i>Pierce v. Society of Sisters</i> , 268 U. S. 510 (1925)	18, 26, 62, 63, 64, 65
<i>Pierre v. Louisiana</i> , 306 U. S. 354 (1939)	66
<i>Powe v. United States</i> , 109 F. (2d) 147 (C.C.A. 5th, 1940)	59
<i>Schwab v. McElhigott, Matter of</i> , 282 N. Y. 182 (1940)	15
<i>Screws v. United States</i> , 325 U. S. 91 (1945)	76
<i>State ex rel. Weiss v. District Board</i> , 76 Wis. 177 (1890)	47
<i>Stein v. Brown</i> , 125 Misc. 692 (1925)	34
<i>United States v. Ballard</i> , 322 U. S. 78 (1944)	42
<i>United States v. Classic</i> , 313 U. S. 299 (1941)	76
<i>Watson v. Jones</i> , 80 U. S. 679 (1871)	42
<i>West Va. St. Bd. of Educ. v. Barnette</i> , 319 U. S. 624	65
<i>Zorach v. Clauson, Matter of</i> , 195 Misc. 531, 275 App. Div. 774, 300 N. Y. 613	12, 13, 44, 66
<i>Zorach v. Clauson</i> , 124 N. Y. Law Journal, August 23, 1950	72-3

Constitutions, Statutes, etc.:

Guam Organic Act (Public Law 630 of the 81st Congress. (July 1950))	58
New York Civil Practice Act, Art. 78, Sections 1283-1306	7, 11, 13, 14, 17, 44, 72
New York Education Law:	
Sec. 3205, subdiv. I	43, 63
Sec. 3210, subdiv. (1)G	3, 8, 16, 18, 19
Sec. 3212	8
Sec. 3228	8
Art. 65, Part I	Append. 81-84

	PAGE
Regulations of Comr. of Educ., Art. 17, §154	3
U. S. Constitution, Amendments I, XI	5-6, 16, 17, 18,
	19, 21, 26, 29, 30,
	41, 43, 58-9, 60, 61

Miscellaneous:

American State Papers on Freedom in Religion (1949)	57
Bates, Religious Liberty (1945)	53
Beard, The Republic (1944)	60
Beckes, Weekday Religious Instruction: Help or Hindrance to Inter-Religious Understanding, National Conference of Christians and Jews, Human Relations Pamphlet No. 6 (1946)	22
Binchy, Church & State in Fascist Italy (1941)	53
Black, Essays and Speeches (1886)	52
Bowers, Jefferson and Hamilton (1925)	25
Bryce, The American Commonwealth, Vol. 2 (3rd ed. 1894)	56, 58-9
Butts, American Tradition in Religion and Education	22, 34
Catholic Bishops, Statement of, New York Times, Nov. 21, 1948	54
DeTocqueville, Democracy in America (1 Amer. ed. 1851), Vol. 1	58
Fleet, Madison's Detached Memoranda, 3 William & Mary Quarterly 534 (3rd Ser. 1946)	55
Frontiers of Democracy, Dec. 15, 1940	22
Garrison, History of Anti-Catholicism in America, Social Action (Jan. 15, 1948)	59
Hamilton, The Federalist No. 84, Federalist Papers 559 (Mod. Lib. ed. 1937)	60
Jewish Educ., Public School Time for Religious Education (Jan., 1941)	22

	PAGE
Johnson and Yost, Separation of Church and State in the United States (1948)	41
Keesecker, Legal Status of Bible Reading, U. S. Office of Educ., Bull. No. 14 (1930)	41
Kimball, Jefferson: The Road to Glory (1943).....	25
Lieber, Civil Liberty and Self-Government (1852)....	56
Madison, Memorial and Remonstrance Against Religious Assessment, Annexed as Appendix to <i>Everson v. Board of Education</i> , 330 U. S. 1, at 64....	51, 57
Madison, Writings, Vol. 5 (Hunt ed. 1920).....	60
Moehlman, School and Church, The American Way (1949)	22
Moehlman, The Church as Educator (1947)	22
Moehlman, The Wall of Separation between Church and State (1951)	22
Murray, Law or Prepossessions? 14 Law and Contemp. Problems, 23 (1949)	55
National Education Association, The Status of Religious Education in the Public Schools	22
Newman, The Sectarian Invasion of our Schools.....	22
New York Times, April 12, 1949; June 15, 16, 18, 20, 21, 1950, December 1, 6, 8, 1951	23, 24, 58
O'Neill, Religion and Education under the Constitution (1949)	24, 55
Parsons, The First Freedom (1948)	55
Pike, Secularization and the Church, Bulletin of General Theological Seminary, June 1951	55
Providence Journal, November 1, 1949	23
Public Education Association, Released Time for Public Education in New York City Schools (1945) and (1949)	21, 22, 50
Religious News Service, July 7, 1948, November 21, 1951	23, 34
Schaff, Church and State in the United States (1888)	56, 58, 60

	PAGE
Shaver, They Reach One-Third (1943)	44
Stokes, Church and State in the United States (1950), Vols. I and II	22, 57
Timasheff, Religion in Soviet Russia, 1917-1942	33
U. S. Congress, Annals, Vol. I (1789)	60
U. S. Department of Commerce, Census of Religious Bodies (1936)	59
U. S. Office of Indian Affairs, Manual for the Indian School Service	34
United States Senate, Journal of Proceedings of the First Session	61-2
Van Dusen, God in Education (1951)	55
Yearbook of American Churches (1951 edition)	59
Zions Herald	23

Supreme Court of the United States

OCTOBER TERM, 1951

No. 431

In the Matter of the Application of

TESSIM ZORACH and ESTA GLUCK,

Appellants,

for an order pursuant to Article 78 of the
Civil Practice Act,

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY
CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE and
JAMES MARSHALL, constituting the Board of Education
of the City of New York, and FRANCIS T. SPAULDING,
Commissioner of Education of the State of New York,
directing them to discontinue certain school practices,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON
RELEASED TIME OF JEWS, PROTESTANTS and ROMAN
CATHOLICS,

Intervenor.

APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

BRIEF FOR APPELLANTS

Opinions Below

The opinion of the Court of Appeals of the State of
New York, including the concurring and dissenting
opinions (R. 114-141) is officially reported in 303 N. Y.

161; and in 100 N. E. (2d) 463. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department, including dissenting opinion (R. 107-11), which was affirmed by the Court of Appeals, is officially reported in 278 App. Div. 573; and in 103 N. Y. S. (2d) 27. The opinion of Special Term, Supreme Court, State of New York, Kings County (R. 81-98), which was affirmed by said Appellate Division, is officially reported in 198 Misc. 631; and in 99 N. Y. S. (2d) 339. The opinion of said Special Term, on its denial of appellant's motion for reargument, is not officially reported, but is reported unofficially in 124 N. Y. Law Journal (August 23, 1950), col. 5, p. 299, and is printed at pages 70-71 in the "Statement as to Jurisdiction" herein as "Exhibit D".

Jurisdiction

The judgment and order of the Court of Appeals of New York (R. 142-3) were filed on July 11, 1951. The Order on Remittitur (R. 143-4) was filed in the Supreme Court, State of New York, Kings County, on July 30, 1951. A petition for appeal (R. 145), an Assignment of Errors and Prayer for Reversal (R. 146-151) and a Jurisdictional Statement ("Statement as to Jurisdiction" herein) were submitted to the Chief Judge of the Court of Appeals of New York on September 19, 1951, and he signed an order allowing appeal and a citation on appeal (R. 145-6) on September 24, 1951. Said Papers on Appeal and Jurisdictional Statement were thereafter filed in this Court. On December 11, 1951, this Court made an order noting probable jurisdiction (R. 154).

The jurisdiction of this Court rests on 28 U. S. C. §1257(2).

The Statute, Regulations and Constitutional Provisions Involved

The statute involved is Section 3210 (1).b of the Education Law of the State of New York (Laws of New York 1940, Ch. 305; McKinney's Consolidated Laws of New York, Book 16, Part 1, Art. 65, Part 1, p. 761). The rules and regulations involved are those of the Commissioner of Education of the State of New York established July 4, 1940 (R. 15-6; 114-5; Regulations of Commissioner of Education, Art. 17, §154; 1 N. Y. Official Compilation of Codes, Rules and Regulations at p. 683); and the additional rules and regulations established by the Board of Education of the City of New York on November 13, 1940 (R. 16-18).

Section 3210 of the Education Law provides:

"§3210. Amount and character of required attendance.

1. Regularity and conduct. (a) A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending. (b) *Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.*" (Italics supplied.)

(Other provisions of the N. Y. Education Law, incidentally relevant herein, are printed in the Appendix below.)

The rules and regulations of the State Commissioner of Education, issued on July 4, 1940, provide (R. 15-6, 114-5):

"1. Absence of a pupil from school during school hours for religious observance and education to be

had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools.

The rules and regulations of the Board of Education of the City of New York, established November 13, 1940, provide (R. 16-18, 115-6):

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

"2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the

public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

"3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal weekly a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week except that in classes on a departmental schedule release will be limited to the last period of the program.

"5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

"6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Rule No. 4 of said rules and regulations of the Board of Education of the City of New York was amended on September 24, 1941 to provide as follows (R. 18):

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

The First and Fourteenth Amendments to the United States Constitution provide in part:

"I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

"XIV. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

(a) Nature of Appeal and Proceeding.

Appellants are appealing from a judgment and order of the Court of Appeals of the State of New York filed July 11, 1951 (R. 142-3) which affirmed, with costs, an order of the Appellate Division of the Supreme Court, Second Judicial Department, entered January 15, 1951 (R. 103-5), which said order, two Justices dissenting, affirmed a final order (R. 6-10) made by Mr. Justice DiGiovanna at Special Term, Part I, of the Supreme Court of the State of New York, Kings County, on June 23, 1950 which (1) denied appellants' motion (R. 73-8, 11-12) for an order directing a trial in respect of triable issues of fact raised by the pleadings and accompanying papers; (2) granted the cross motion of the intervenor (R. 79-80) for a final order dismissing the proceedings on the merits on the ground that the petition fails to state facts sufficient to constitute a cause of action; (3) sustained the objections (R. 26, 51) in the answers of the

respondents in point of law to the petition, to wit, that the petition fails to state facts sufficient to constitute a cause of action against them; and (4) denied the appellants' application in all respects and dismissed their petition on the merits as a matter of law.

This proceeding, in the nature of mandamus, was brought by appellants under and pursuant to Article 78, Sections 1283-1306 of the New York Civil Practice Act, which relates to "Proceedings Against a Body or Officer". The purpose of the proceeding, as appears from the demand for relief in the petition (R. 23), is to obtain an order against respondent Board of Education and respondent Commissioner of Education, directing them to discontinue the program of released time for religious education in practice in New York City and to rescind and abrogate the regulations promulgated by them respecting and authorizing such released time program, on the ground that such released time program, as authorized and as operated, is unconstitutional under the First and Fourteenth Amendments of the United States Constitution.

**(b) The Petition and Other Pleadings and
Accompanying Papers**

Appellants' petition sets forth the following:

Appellants are United States citizens, taxpayers and property owners in Kings County, City and State of New York and appellants' children attend Public Schools Nos. 8 and 130 in Brooklyn, New York City (R. 13). The released time program in question is in operation there and in New York City public schools generally (R. 18). Neither of the appellants has sought to take advantage of the released time program. None of their children participates in the released time program but all regularly attend

Protestant Episcopal or Jewish schools for religious instruction at times other than the hours in which public schools are in session (R. 22). When other pupils in these schools are released to attend classes in religious instruction outside of the schools, they are required to remain in attendance at the public schools to continue secular studies and work thereat (R. 19-20).

In June 1948, each of the appellants demanded of respondents that they rescind their regulations and discontinue the released time program in the public schools of New York, including public schools numbered "8" and "130", but respondents failed and refused to do so (R. 22). The respondent Commissioner of Education as the chief executive officer of the New York State system of education, is charged with enforcement of laws relating to the educational system of the State, the execution of state educational policies and the general supervision of all schools subject to the provisions of the Education Law, including the public schools in New York City (R. 13-14). Respondent Board of Education has immediate supervision and control of the public school system of the City of New York and is obligated to perform any duty imposed by the State Education Law or by authorized regulations of the Commissioner of Education (R. 14).

Under Section 3212 of the New York State Compulsory Education Law, appellants are required to send their minor children to attend regularly upon instruction during the entire term the appropriate public schools are in session and failure to do subjects them to the penalties provided in Section 3228 of said Education Law (R. 14-15).

Respondent Commissioner of Education, purporting to act pursuant to Section 3210 of said Education Law (which provides that absence for religious education shall be permitted under rules that the Commissioner shall establish)

promulgated certain regulations, setting up the released time program, quoted above and set forth in the petition (R. 15-16). Also purporting to act pursuant to said statute, respondent Board of Education established additional regulations, relating to the operation of said released time program, quoted above and set forth in petition (R. 16-18).

The released time program is actually operated in the New York City public schools in the following manner: It is under the supervision of an organization known as The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, hereafter referred to as "Committee". This Committee was formed to promote religious instruction through use of the public school system and cooperates closely with the public school authorities in the management of the program and in promoting religious instruction. The Committee or church authorities distribute either to parents of public school children at home or in churches or to such children at or near the public school premises, cards for signatures to indicate the parent's approval of his child being released for sectarian religious instruction during school hours. Children whose parents sign such cards deliver them to the public school authorities who in turn deliver lists of the children whose parents so consent to the Committee or to the religious centers. These children are released regularly for one hour each week from attendance at public school on condition that they attend during the released hour at the religious center for sectarian instruction. Parents who sign such consent cards do so on the understanding with the public school authorities, in consideration of their children being released from public school attendance, that the children will attend and receive sectarian instruction at the religious centers. Children whose parents do not sign consent cards are separated from the other children and are

required to continue in attendance at the public schools. Released children receive sectarian religious teaching in the faith of the center at which they attend. Weekly, the religious centers file with the public school system and the Committee a list of those children who have been released from public school but have not reported for religious instruction at the religious centers (R. 18-20).

Under the aforesaid regulations (R. 15-18), the courses in religious education must be maintained and operated by or under the control of duly constituted religious bodies; pupils must be registered for religious courses and a copy of the registration filed with the local public school authorities; reports of attendance of pupils upon such courses must be filed with the school principal or teacher at the end of each week—together with a statement of the reason for any absence from religious instruction.

The administration of the system necessarily entails use of the public school machinery and time of public school principals, teachers and administrative staff (R. 20). The operation of the compulsory education system in New York assists and is integrated with the program of sectarian religious instruction carried on by separate religious sects and pupils compelled by law to go to school for secular instruction are released, in part, from their legal duty on the condition that they attend religious classes (R. 20).

The operation of the released time program has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction; and in divisiveness because of difference in religious beliefs and disbeliefs; and is a utilization of the State's tax-established and tax-supported public school system to aid religious groups to spread their faith (R. 20-21).

The petition further alleges (R. 21-2), as conclusions of law, that the operation of the released time program, as aforesaid, and said statute and regulations, violate the First and Fourteenth Amendments of the United States Constitution.

The petition is based on the decision of this Court in the case of *Illindis ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), as a comparison of said allegations with the opinion of this Court and the concurring opinions therein will readily show.

The answer of respondent Board of Education (R. 24-26) admitted the statutes and regulations but denied other material allegations of the petition, notably paragraphs 9th, 10th, 11th, 12th to 20th, 23rd, 24th (R. 24-25). Accompanying this answer were four annexed affidavits (R. 24-25, 27-49) which put into issue appellants' allegations regarding the operation of the released time program. Pleaded as an affirmative "defense" was the alleged insufficiency of the petition (R. 26).

The answer of respondent Commissioner of Education (R. 50-51) admitted the statutes and regulations but denied other material allegations of the petition, notably paragraphs 9th to 20th, inclusive, and 23rd and 24th (R. 50). Attached to this answer were five affidavits or statements putting into issue appellants' allegations as to the actual operation of the released time program. Pleaded as an "objection in point of law" was the alleged insufficiency of the petition.

(Parenthetically, it should be noted that the only statutory justification for or purpose of such affidavits and statements as were annexed to and submitted with said respondents' answers was to show "such evidentiary facts as shall entitle a respondent to a trial of any issue of fact" (N. Y. Civ. Prac. Act §1291).)

The answer of intervenor (R. 64-70) admitted the statutes and regulations but denied the other material allegations of the petition (R. 64-65) and alleged affirmatively three defenses (R. 65-70), none of which was passed on below and each of which manifestly is legally insufficient. A reply directed to the new factual matter alleged in said defenses was served by appellants (R. 71-72).

(c) Prior Proceedings

On June 27, 1948, the appellants each demanded of the New York State Commissioner of Education and the New York City Board of Education (hereinafter referred to as the respondents) that they rescind their regulations and discontinue the released time program in the New York public schools (R. 22). Upon respondents' refusal or failure to comply with these demands, appellants commenced this proceeding on July 27, 1948 by service of notice of motion and verified petition (R. 11-23). On the original return day, August 4, 1948 (R. 11), respondent Commissioner of Education interposed an objection to the jurisdiction of the Supreme Court, Kings County, which was consistently denied, though pursued by said respondent through the highest appellate court of the State of New York (see *Matter of Zorach v. Clauson*, 86 N. Y. Supp. (2d) 17; *unan. affd.* 275 App. Div. 774; *unan. affd.* 300 N. Y. 613). This collateral attack long delayed a hearing on the merits of the petition (R. 75-78). In January 1950, respondents served their respective answers to the petition which were supplemented by affidavits and contained an objection that the petition was legally insufficient (R. 24-49, 50-63, 26, 51). On May 12, 1949, The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, referred to in the petition (R. 18-20), applied for and obtained

leave to intervene, under Section 1298 of the Civil Practice Act, on the ground that it was "specially and beneficially interested in upholding" the released time program (*Matter of Zorach v. Clauston*, 195 Misc. 531). (This Committee, according to said application, is composed of twelve laymen.) In June 1949, said intervenor served an answer containing denials and new matter (R. 64-70) as to which appellants served a reply (R. 71-2).

Appellants, by notice dated April 6, 1950, restored the matter to the calendar for a hearing (R. 73-4) and on the return day the matter was adjourned on respondents' application to May 15, 1950, when it was heard before Mr. Justice DiGiovanna. On April 10, 1950, intervenor moved for a final order "dismissing the proceedings on the merits in that the petition fails to state facts sufficient to constitute a cause of action, and in that such respondent is so entitled on the pleadings" (R. 79). After Mr. Justice DiGiovanna had rendered his decision on June 20, 1950 (R. 81-98) and made a final order in accordance therewith (R. 6-10), appellants applied to him for a reargument, which application was denied, by an unappealable order, with a memorandum (Ex. D, Statement as to Jurisdiction, pp. 70-71). On appeal from said final order (R. 4-5), the Appellate Division, two Justices dissenting, by an order made January 15, 1951, affirmed (R. 103-11).

On appeal to the Court of Appeals (R. 101-2) that Court, with one Judge dissenting, affirmed the order of the Appellate Division (R. 142-3).

(d) The New York Practice

Under Article 78 of the New York Civil Practice Act, the application for relief, in a "proceeding against a body or officer", shall be founded upon a petition "which shall contain a plain and concise statement of the material facts

on which the petitioner relies" and which "shall demand the relief to which the petitioner supposes himself entitled" (Civ. Prac. Act §1288). It is not necessary to set forth in the petition the evidence by which such statements are to be proved (Compare Civ. Prac. Act §1288 with §§1306 and 241), though the petition "may" be accompanied by affidavits and other written proof (Civ. Prac. Act §1288). On the other hand, the answer to the petition must contain proper denials and statements of new matter and must set forth such facts as may be pertinent and material to show the grounds of the action taken by respondent, which is complained of, and respondent is also required to submit, with the answer, affidavits or other written proof "showing such evidentiary facts as shall entitle him to a trial of any issue of fact" (Civ. Prac. Act §1291). The respondent may raise an objection in point of law warranting dismissal of the petition in the answer or by application to the Court on the return day "for an order dismissing the petition as a matter of law" (Civ. Prac. Act §1293). Upon the return day of the application, if no triable issue of fact is duly raised by the pleadings and accompanying papers, the Court must render "such final order as the case requires". But if a triable issue of fact is duly raised, a trial must be ordered (Civ. Prac. Act §1295). Statements made in the answer are not conclusive upon the petitioner (Civ. Prac. Act §1296).

The Court of Appeals has said that it is settled law in New York, on a motion under §1293 of the Civil Practice Act to dismiss such an Article 78 petition upon the ground that it fails to state facts sufficient to constitute a cause of action, that the truth of all of the facts alleged in the petition are deemed to be true in so far as relevant or material (*Matter of Hines v. State Board of Parole*, 293

N. Y. 254, 258 (1944); *Matter of Schwab v. McElligott*, 282 N. Y. 182, 185-6 (1940)).

Under this practice "conclusions of law" in the petition are not deemed admitted on a motion to dismiss for insufficiency (*Matter of Hines v. State Board of Parole*, *supra*, at p. 258), but that does not apply to statements of ultimate facts. While the Court of Appeals stated (R. 122) that many of the allegations in the petition are "conclusory in character", it did not point out specifically any such allegations or state that such allegations consisted of conclusions of law. As Judge Fuld of that Court stated (R. 133) for purposes of such a motion all of the factual allegations of the petition must be deemed admitted, even though some of them are denied in whole or in part in the answers.

Specification of Assigned Errors to be Urged

Appellants will urge all of the errors assigned (R. 147-151) namely that the Court of Appeals erred in the following respects:

1. In affirming the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which affirmed the final order of the Supreme Court of the State of New York, Kings County, which (a) dismissed petitioners' petition on the merits as a matter of law and denied in all respects petitioners' application for an order, directed against respondents requiring them to rescind their regulations and to cause the discontinuance of the released time program in operation, as prayed for in their petition and notice of motion; (b) denied in all respects petitioners' motion for an order directing a trial in respect of triable issues of fact raised by the pleadings; (c) sustained the objections of the respondents in point

of law to the petition, i. e., that the petition failed to state facts sufficient to constitute a cause of action against either of the respondents; and (d) granted in all respects the motion of the intervenor-respondent for a final order dismissing the proceedings on the merits on the ground that the petition failed to state facts sufficient to constitute a cause of action.

2. In holding that Section 3210 of the Education Law of the State of New York, particularly Par. 1, subdivision b thereof, and the regulations established pursuant to said statute by respondent Commissioner of Education of the State of New York and by respondent Board of Education of the City of New York, are not in violation of the First and Fourteenth Amendments of the United States Constitution and do not constitute laws respecting an establishment of religion or prohibiting the free exercise of religion.

3. In holding that the operation of the released time program in the New York City schools, either as such operation is described in petitioners' petition herein or as such operation is admitted by the respondents and intervenor in their pleadings herein, does not violate the First and Fourteenth Amendments of the United States Constitution and does not violate the prohibition against laws respecting an establishment of religion or prohibit the free exercise of religion.

4. In holding that the petitioners were not entitled in this proceeding and on the pleadings of all the parties, to a final order, on the merits, granting the relief prayed for in their petition, under the provisions of the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCullum v. Board of Education*, 333 U. S. 203.

5. In dismissing petitioners' petition on the merits as a matter of law; denying in all respects

the petitioners' application for an order against respondents as prayed for under Article 78 of the New York Civil Practice Act; sustaining the objections of the respondents in point of law to the petition; granting in all respects the intervenor's motion for a final order dismissing the proceeding on the merits; and denying in all respects petitioners' motion for an order, in any event, directing a trial of triable issues of facts raised by the pleadings.

6. In holding that the petition of the petitioners in this proceeding did not state facts sufficient to constitute a cause of action and to entitle them to the relief prayed for, under the provisions of the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCullum v. Board of Education*, 333 U. S. 203.

7. In holding that the decision of the United States Supreme Court in the case of *McCullum v. Board of Education*, 333 U. S. 203, and the legal and constitutional principles stated and established therein were not controlling in the determination of the constitutional issues involved in this proceeding either as presented in petitioners' petition or as presented in the pleadings as a whole.

8. In holding that the decision of the New York Court of Appeals in *People ex rel. Lewis v. Graves*, 245 N. Y. 195, 198 (decided in 1927 in respect of a released time system operated in White Plains, N. Y. and before the U. S. Supreme Court had decided *McCullum v. Board of Education*, 333 U. S. 203 or had held the freedoms guaranteed by the First Amendment were protected by the Fourteenth Amendment against laws or acts of the several states or their agencies) was a binding and controlling precedent in the determination of the constitutional issues involved and presented in this proceeding.

9. In holding that there are radical or substantial differences in elements or respects that are constitutionally important and crucial between the "released time" program in operation in Campaign County, Illinois, prior to its invalidation as unconstitutional in *McCollum v. Board of Education*, 333 U. S. 203, and the "released time" program presently authorized and established by statute and by respondents' regulations and operated in the New York City public schools.

10. In holding that the invalidation and discontinuance, as unconstitutional under the First and Fourteenth Amendments of the United States Constitution, of the New York system of released time so authorized and established by state statute and respondents' regulations and so practiced in New York City public schools, would represent "a government hostility to religion" which would be 'at war with our national tradition' or would interfere with the free exercise of religion by anyone, or would interfere with any legitimate right of parents to direct the rearing and education of their children under the doctrine of *Pierce v. Society of Sisters*, 268 U. S. 510 or under the laws and Constitution of the United States.

11. In failing to hold that the New York system or program of "released time", as authorized and established by Section 3210, Par. 1, subdivision b of the Education Law of the State of New York, the regulations of the Commissioner of Education of the State of New York and the regulations of the Board of Education of the City of New York and as actually practiced and operated in the New York City public schools violates the First and Fourteenth Amendment of the United States Constitution in that such statutes, regulations and practices constitute a law respecting an establishment of religion and prohibiting the free exercise thereof.

12. In failing to hold that Section 3210, Par. 1, subdivision b of the Education Law of the State of New York, and the regulations of respondent Commissioner of Education and respondent Board of Education established pursuant thereto, and the operation of the released time program in the New York City public schools constitute a law respecting an establishment of religion and prohibiting the free exercise thereof in violation of the First and Fourteenth Amendments of the United States Constitution.

13. In failing to hold that the New York system of released time, as authorized and established by state statute and by respondents' regulations and as practiced and operated in the public schools in New York City is in violation of the constitutional requirement for a separation of church and state under the First and Fourteenth Amendments of the United States Constitution and the decision of the United States Supreme Court in *McCullum v. Board of Education*, 333 U. S. 203.

14. In failing to hold, within the principles laid down by the United States Supreme Court in *McCullum v. Board of Education*, 333 U. S. 203, that the New York system of "released time", as authorized and established by state statute and by regulations of the respondents and as practiced and operated in the public schools of New York City, is a system of "released time" in which (a) is involved the utilization of the state's tax-established and tax-supported public school system to aid religious groups to spread their faith and to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals; (b) is involved the close cooperation between public school authorities and a religious council in promoting religious education for public school children during public school hours on compulsory education time; (c) the operation of the state's compulsory education system

assists and is integrated with the program of religious instruction carried on by separate religious sects; (d) pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes; (e) the state affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery; (f) the momentum of the whole public school atmosphere, planning and machinery is put behind the religious instruction; (g) the inevitable result is divisiveness among public school children and the exerting of pressure and coercion upon parents and such children to secure attendance by the children at classes for religious instruction; (h) state laws and state power aid one, or some, or all religions and prefer one religion over another; (i) taxes are levied to support religious activities or institutions; and (j) there is not a separation of church and state.

15. In failing to hold that the New York system of released time, as so authorized and established by statute and respondents' regulations and as operated in the New York City schools, is not subject to the same constitutional infirmities that the United States Supreme Court found in the case of *McCullum v. Board of Education*, 333 U. S. 203, in respect of the system or program of "released time" theretofore operated in Champaign County, Illinois.

16. In failing to hold, on the basis of the state statute, the regulations of the respondents and the admitted allegations of the petition, that the petitioners were entitled, on the merits, to an order in this proceeding granting all the relief prayed for by them in their petition.

17. In failing to hold that the limiting of participation in the New York system of released time to "duly constituted religious bodies" effects un-

lawful censorship of religion and effects a preference in favor of certain religious sects in violation of the First and Fourteenth Amendments of the United States Constitution.

The Nature of Appellants' Opposition to Released Time

Before considering the issues presented by this appeal, it is regrettably necessary again to state that appellants' opposition to released time is in no way motivated by hostility to religion or religious education.¹ As alleged in the petition (R. 22), the children of appellants receive religious instruction at their respective religious schools completely independent of the public school system. Manifestly, therefore, appellants are not motivated by anti-religious considerations.

Many responsible groups oppose released time upon considerations other than hostility to religion. Some oppose the program because it encourages truancy.² Others, because it is a divisive influence, having a detrimental effect on inter-religious relationships among public

¹ See statement of New York, Kings County, Supreme Court (R. 87-8) that the granting of the relief sought by appellants "would be a step in the direction of and be consonant with totalitarian and communistic philosophies existing in jurisdictions wherein atheism and the suppression of all religions are preferred to the freedom of the individual to seek religious instruction and worship". Similar overtones are found in the Court of Appeals opinion by Froessel, J. (R. 120) and Desmond, J. (R. 131); also, in the briefs in that court of intervenor and respondent Board of Education, the latter, itself a civil, secular, public body, stating (at p. 38): "Unmistakably, the cause pleaded by the petitioners is a cause of irreligion. Secularism to the exclusion of religion under any and all conditions is their theme. They would do away with the American tradition that 'this is a religious people'."

² Public Education Association, *Released Time for Religious Education in New York City Schools* (1949).

school children.³ Still others oppose released time because it is completely ineffective as religious education and gives rise to false belief in many parents that it is an adequate substitute for real religious education.⁴ Many educators oppose the program because it imposes a heavy administrative burden on the public school system.⁵

Most opposition to released time is based on the ground stated in *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), that it constitutes a violation of the fundamental American principle of separation of Church and State.⁶

The baselessness of the charge that opposition to released time is motivated by hostility to religion is obvious from the fact that religious groups are among the strongest opponents of the program. In the *McCollum* case, briefs *amicus curiae* in opposition to released time were submitted in behalf of the Baptists Joint Conference Committee on Public Relations, representing the largest Protestant denomination in the United States; the Syna-

³ Editorial, *Public School Time for Religious Education*, *Jewish Education*, January, 1941, 130-132; Moehlman, *Schools and Church: The American Way* (3rd ed. 1944), p. 132 and "The Church as Educator" (1947), Chap. 10; Editorial, *Frontiers of Democracy*, December 15, 1940, p. 72; Beckes, *Weekday Religious Instruction: Help or Hindrance to Inter-Religious Understanding*, National Conference of Christians and Jews, Human Relations Pamphlet, No. 6 (1946), pp. 8, 13-15.

⁴ 2 Stokes, *Church and State in the United States*, 534, 548.

⁵ Public Education Association, *Released Time for Religious Education in New York City's Schools*, 1945, p. 14.

⁶ See various *Amicus Curiae* briefs filed in the U. S. Supreme Court in the *McCollum* case, *supra*, especially those filed on behalf of various religious groups and by American Civil Liberties Union. See, also, e.g., 2 Stokes, *Church and State in the United States*, 523-4, 530-31; Butts, *American Tradition in Religion and Education*, 189-190; National Education Association, *The Status of Religious Education in the Public Schools*, 19; Newman, *The Secularian Invasion of our Schools*, *passim*. For a most recent summary of the reasons for opposing released time see Moehlman, "The Wall of Separation Between Church and State" (1951), at pp. 155-6.

gogue Council of America, representing almost all Jewish clergymen and congregations; the American Unitarian Association; and the General Conference of Seventh Day Adventists. In 1949, a bill to permit released time in Rhode Island was defeated as a result of the strong opposition of the Rhode Island Council of Churches. Recently, in Pocatello, Idaho, the local Protestant ministerial association voted to bring suit to enjoin effectuation of a proposal to introduce released time religious instruction in the public schools of Idaho. These and many other religious groups and leaders who have expressed their opposition to released time can hardly be termed anti-religious.

Commenting editorially on the decision of the New York, Special Term, court herein, *Zions Herald* said:

"We still believe that the compulsory framework of public education should not be used for the teaching of religion, either in or out of the school building. There is a wedge involved here that will someday be an embarrassment to the defenders of separation of Church and State."

Zions Herald is edited by a group of prominent Methodist churchmen. It is impossible to conceive that any of these clergymen desire to further anti-religious or atheistic causes.

The contention that opposition to released time manifests hostility to religion was asserted by counsel in the *McCullum* case and was rejected by this Court in language which should have put an end to this fallacious and unfair argument:

"To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public

⁷ *New York Times*, April 12, 1949; *Providence Journal*, November 1, 1949.

⁸ Religious News Service, November 21, 1951.

school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable." (333 U. S. 203, 211-12)

Similarly, Mr. Justice Frankfurter said in his concurring opinion in that case:

"The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom." (333 U. S. 203, 216).⁹

Appellants oppose the New York released time system, both as actually operated and as authorized by statute and regulations, because it conflicts with and tends to nullify the fundamental American principle of separation of Church and State, which is the only true guarantee of that

⁹ These statements did not forestall censure of this Court and its decision from some religious groups. See e.g., Statement of the Catholic Bishops, New York Times, Nov. 21, 1948, p. 63, col. 4; O'Neill, *Religion and Education under the Constitution* (1949), *passim*.

other basic American principle, freedom of religion.¹⁰ Their cause is one for true Americanism, religious freedom for all and the American democratic, secular, free public school system.

In spite of the unfounded and abusive assertions herein, appellants have been heartened in the knowledge that Thomas Jefferson, one of the greatest of Americans and a truly religious man, was publicly and falsely denounced, in his time, as an "atheist" and "infidel"; and that "the clergy hated him for forcing the separation of Church and State" and referred to his famous "Virginia Bill for Religious Liberty" (a landmark document in the history of religious freedom) as the "atheist" law. Bowers, *Jefferson and Hamilton* (1925 Ed.), at pp. 103-5, 352, 454; Kimball, *Jefferson: The Road to Glory* (1943) at pp. 123-129.

The real issues herein should not be muddled by unfair references to totalitarianism, communism or atheism.

Summary of Argument

I. The specific issue in this case has already been decided by this Court. In *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948), this Court considered and passed upon the validity under the First and Fourteenth Amendments of released time programs containing the essential elements of the New York system as authorized by the New York statute and regulations. This Court ruled that such a program was violative of the United States Constitution. The New York courts therefore erred herein in holding that they were free to pass upon the constitutionality of the program and were not bound by the holding in the *McCollum* case.

¹⁰ Cf. *Everson v. Board of Education*, 330 U. S. 1, 9-11, 15, 53, 63 (1947); *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 212, 216.

II. Even if the specific facts of the New York released time program were not passed upon in the *McCollum* case and the particular issue is open, adherence to the meaning of the First and Fourteenth Amendments as expressed in *Everson v. Board of Education*, 330 U. S. 1 (1947), and reiterated in the *McCollum* case requires a determination that the New York program is unconstitutional. The program, as authorized by the statute and regulations, constitutes state aid to religion and involves governmental participation in the affairs of religious organizations and participation by religious organizations as such in the affairs of government. The New York system of released time, therefore, cannot be sustained unless this Court changes the meaning of the First and Fourteenth Amendments as expressed by both the majority and minority in the *Everson* case and reiterated in the *McCollum* case.

III. There is no basis in law, logic or history for modifying the meaning of the Constitution stated by this Court in the *Everson* and *McCollum* cases. An interpretation of the First Amendment narrower than that stated in those cases would in effect confer upon government powers that the Constitutional Convention and the Congress which adopted the First Amendment refused to confer. It would be inconsistent with the interpretation uniformly accepted during the more than a century and a half which has passed since the Constitution and Amendment were adopted.

IV. Invalidation of the released time system would not interfere with the right to freedom of religion of anyone; it would not constitute an overruling of *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); and, finally, it would not affect or be inconsistent with the practice of excusing absences of children from public schools on their religious holidays.

V. For the reasons stated above, we believe that judgment should have been granted to appellants on the basis of the conceded statute and regulations. We contend further that the court below erred in failing to accept as true the allegations of fact in the petition and in denying appellants an opportunity to prove material allegations insofar as they were contested. A trial of the triable issues of fact would disclose that the actual operation of the released time program in New York violates appellants' constitutional rights under any interpretation of the *McCollum* case. While judgment for the appellants could have been granted without trial, the allegations of the petition required at least a trial of the factual issues before judgment could be granted *against* appellants.

ARGUMENT

POINT I

Systems of released time such as that authorized by the New York Statute and Regulations were considered, passed upon and ruled invalid by this Court in the *McCollum* case.

It is appellants' primary and basic contention in this proceeding that the New York program of released time, as authorized by the statute and regulations (and even if operated as described by appellees in their answers and accompanying papers) was considered, passed upon and ruled invalid by this Court in the *McCollum* case. We submit, therefore, that the New York courts erred in holding that the decision in that case was not "binding precedent" (R. 116-8, 123).

A. The McCollum Decision

In the *McCollum* case, this Court considered an appeal by a parent of a school child in the public schools of Champaign, Illinois, seeking to invalidate the released time program in operation in that city. The undisputed facts, apart from others, showed that the plan had been instituted in 1940 through the action of a voluntary association consisting of lay and clerical members of the Jewish, Roman Catholic and some Protestant faiths, known as "The Champaign Council of Religious Education". (That association was similar in organization, operation and aims to the intervenor Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics in this proceeding (R. 18-20)). The Champaign Council obtained permission from the school board to offer classes in religious instruction to public school pupils during regular school hours in the school buildings. At the beginning of each term the religious classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend such religious instruction classes. Children who obtained such parental consent were released by school authorities from their secular school work for a period of thirty minutes each week in elementary schools and forty-five minutes in junior high schools on condition they attend the religious classes. Reports of their presence or absence thereat were to be made to their secular teachers. Children who did not obtain such parental consent were not released from public school duties but continued with their regular secular studies under the supervision of the public school authorities. The children who took religious instruction were separated from those who continued with regular school work and also into Protestant, Jewish or Roman Catholic groupings. The teachers and teaching

materials were selected, supplied and financed by the Council.

With Mr. Justice Reed dissenting, this Court held that such a released time program was unconstitutional as violative of the "establishment of religion" clause of the First Amendment (made applicable to the states by the Fourteenth Amendment). Four opinions were written: The opinion of the Court, written by Mr. Justice Black, in which Chief Justice Vinson and Mr. Justices Douglas, Murphy, Rutledge and Burton joined; a concurring opinion by Mr. Justice Frankfurter in which Mr. Justice Jackson concurred, as well as Mr. Justices Rutledge and Burton (who also concurred in the Court's opinion); a separate concurring opinion by Mr. Justice Jackson; and a dissenting opinion by Mr. Justice Reed.

B. The Opinion of the Court in the *McCullum* Case

The constitutional premise upon which this Court's opinion was based was set forth in the *Everson* case, 330 U. S. 1, 15-16, and reiterated in the *McCullum* case, 333 U. S. 203, 210-211. In both, this Court said that, at the very least, under the First and Fourteenth Amendments of the U. S. Constitution:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or for professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they

may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"

Applying these principles, the Court found that such a released time system was unconstitutional—pupils compelled by law to go to school for secular education were released in part from their legal duty upon the condition that they attend religious classes; this was unquestionably a utilization of the tax-established public school system to aid religious groups to spread their faith; the state had afforded sectarian groups an invaluable aid in that it helped to provide pupils for their religious classes through use of the state's compulsory public school machinery, contrary to the First Amendment's principle of separation of Church and State.

It is clear from a reading of the Court's opinion that the Court intended to and did invalidate any released time program which involved the use of the tax-established and tax-supported, compulsory, public school machinery as an aid in recruiting children for religious instruction, regardless of the use of school buildings or other specific aspects of the use of the public school machinery in the Champaign situation. The state compelled all children to attend school for a specified number of hours weekly for secular instruction. It then, in effect, entered into an agreement with willing parents to release their children in part from that obligation, if they used the released time to participate in religious instruction. This release, the Court held, was an aid to religion in violation of the First Amendment.

The Court made it clear elsewhere in the opinion (333 U. S. 203, 204-205, 211) that what was involved was "the

power of the state to utilize its tax-supported public school system in aid of religious instruction" and "to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals."

The Court's opinion rested basically on that aspect of the case. The Court took pains to note that the appellants there were relying, also, on the advantages which the plan gave to some Protestant groups over others, on the essentially involuntary nature of the plan in practice, on the power given school officials to control the selection of teachers, and on the power given the Council to determine the participating religious faiths, and then said:

"In view of our decision we find it unnecessary to consider these arguments or the disputed facts upon which they depend" (333 U. S. 203, 207, note 1).

It was the use of the tax-supported public school machinery as a recruiting or channeling agency for sectarian groups that the Court invalidated. The Court was careful to use language in its opinion which could not reasonably be construed as being limited merely to systems identical with that prevailing in Champaign. It stated:

"The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. *Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment* . . ."

333 U. S. 203, 209-210. (Emphasis supplied.)

The final paragraph of the Court's opinion stated the crux of the matter:

"Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. *The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery.* This is not separation of church and state." 333 U. S. 203, 212. (Emphasis supplied.)

The Court, in so deciding the case, was familiar with all details of the New York system and its operation off the school premises. A brief *amicus* had been filed therein by Charles H. Tuttle, Esq., attorney for the intervenor in the present case, setting forth in detail the nature of the New York released time system. It was similarly referred to and discussed in Mr. Justice Reed's dissent which set forth, *in haec verba*, the state statute and the regulations of the Commissioner of Education attacked herein. The rules of the New York City Board of Education were noted and a description of the New York released time program as authorized by the regulations and rules was set forth. He also noted that these practices had been approved by the New York Court of Appeals in *People ex rel. Lewis v. Graves*, 245 N. Y. 195. (See 333 U. S. 203, 250-51.)

With full knowledge of all the relevant facts concerning the New York plan, this Court cast its opinion in terms which established the invalidity of released time systems of both the Champaign and New York types as violative of the American tradition of separation of church and state, incorporated in the First and Fourteenth Amendments. It held, as Mr. Justice Reed recognized, that under the "Court's judgment . . . children cannot be released or dismissed from school to attend classes in reli-

gion while other children must remain to pursue secular education," and "religious instruction of public school children during public school hours is prohibited." 333 U. S. 203, 241, 252. (Emphasis supplied.) As noted above, the Court expressly passed over additional facts urged in opposition to the Champaign plan, finding it "unnecessary" to consider them. 333 U. S. 203, 207, note 1.

In view of this express language in the opinion, it is surprising to find that the very facts which this Court regarded as irrelevant in the *McCullum* case are now relied on to distinguish it. We submit that the underlying rationale of that opinion cannot be so readily disregarded. Those who have read the opinion as meaning what it says have uniformly rejected the argument made by appellees here.

The Circuit Court of Champaign, directed by this Court to give effect to the *McCullum* decision, interpreted it as forbidding any form of released time. The final order for mandamus, issued by the Circuit Court, stated:

"It is HEREBY ORDERED (1) that the Board of Education of Community Unit School District Number 4, Champaign County, Illinois, immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in the manner heretofore conducted by said School District Number 71 in all public schools within the original School District Number 71, Champaign County, Illinois, and in all public school houses and buildings in said district when occupied by public schools; and

"(2) To prohibit within said original School District Number 71 the use of the state's public school machinery to help enroll pupils in the several religious classes of sectarian groups." (Emphasis supplied.)

Neither the Champaign Board of Education nor the Champaign Council of Religious Education (the organization corresponding to intervenor herein) appealed from this order. Instead, *they discontinued religious instruction during public school hours and substituted after hour instruction*. Incidentally, no impairment of the effectiveness of the program of weekday religious instruction resulted. Religious News Service, July 7, 1948.¹¹

The Illinois Supreme Court itself has recognized the *essential similarity*, for all practical and constitutional purposes, of the Champaign and New York plans. In its decision in the *McCullum* case upholding the Champaign plan, 396 Ill. 14 (1947), reversed in 333 U. S. 203, the Illinois Supreme Court relied upon the case of *People ex rel. Latimer v. Board of Education*, 394 Ill. 228 (1946).

¹¹ The same interpretation of the *McCullum* decision has been made by the United States Department of Interior. In 1949, the Office of Indian Affairs amended its regulations to prohibit religious education of Indian children during hours of attendance at Governmental schools. (*Manual for the Indian School Service*, Section 99 (6).) The amendment was made following an opinion by the Department's Solicitor that: "The decision of the Supreme Court in the case of *People of the State of Illinois ex rel. Vashti McCullum v. Board of Education of School District No. 71, Champaign County, Illinois*, decided March 8, 1948, prohibits the use of the so-called 'released time' by tax supported schools. Hence, students of Indian Service schools may not be released for religious instruction for any part of the time prescribed for regular school classes." (Emphasis supplied.) The Supreme Court of Wisconsin also interpreted the *McCullum* decision as forbidding "the use of public-school time and the course of instruction given the children through the compulsory-education law to teach religious doctrines, creeds, and principles." *County of Milwaukee v. Carter*, 258 Wis. 139, 143 (1950). (Emphasis supplied.) See also, *Balaza v. Board of Education of St. Louis* (#18369, Div. No. 3, May 23, 1945 per Koerner, J., not off. rep.) which invalidated a system of released time in operation in St. Louis similar to that in New York City as unconstitutional on the basis of the *McCullum* decision, quoted in full in Butts, *The American Tradition in Religion and Education* (1950) at pages 207-8; compare *Stein v. Brown*, 125 Misc. 692 (1925), an earlier New York case which invalidated a Mt. Vernon, N. Y. released time system, essentially similar to New York City's, in a cogent opinion.

That case, in turn, involved a system of released time exactly like New York's and the Illinois Supreme Court there cited and relied upon the earlier New York case of *People ex-rel. Lewis v. Graves*, 245 N. Y. 195 (1927), which the Court of Appeals in the present case held to be "binding precedent" (R. 118, 123-4). In its decision in the *McCollum* case, the Illinois Supreme Court said it was "apparent" that the Champaign system was "to all intents and purposes exactly the same" as the system involved in the *Latimer* case (which was also the New York system in the *Graves* case) and the fact that in one the classes were held in the schoolrooms while in the other the classes were held at places outside of school activities and property was of no significance. 396 Ill. 14, 23.

C. The Concurring Opinion of Mr. Justice Frankfurter

Although the New York Court of Appeals asserted that the opinion of this Court (concurring in by six of the nine justices) did not invalidate the New York system, it is clear that it placed its principal reliance upon the concurring opinion of Mr. Justice Frankfurter (R. 117-8).¹² We submit, however, that this concurring opinion does not require a determination different from the one reached under the Court's opinion.

The concurring opinion represented the views of a group of four justices who had taken an even more rigorous view of the requirement of separation than that taken by their five brethren in the prior *Everson* case. Their dissent in that case was expressly referred to at the opening

¹² It should be noted parenthetically that, notwithstanding the reliance of the Court of Appeals on Mr. Justice Frankfurter's concurring opinion, it effectively ignored his admonition regarding "the importance of detailed analysis of the facts" by its refusal to allow appellants to establish their factual contentions through a trial. See Point V below.

of the concurring opinion. 333 U. S. 203, 212. Furthermore, two of the justices who concurred in Mr. Justice Frankfurter's opinion likewise concurred in the opinion of the Court. It is difficult to believe that this group of four justices intended, in the *McCullum* case, to take a position just the reverse of the position they had taken the year before in the *Everson* case. Nor does the opinion itself support such a view.

After reviewing the history of secular and sectarian education in America, Mr. Justice Frankfurter said:

"The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the *prohibition of furtherance by the State of religious instruction* became the guiding principle, in law and feeling, of the American people." 333 U. S. 203, 215. (Emphasis supplied.)

Mr. Justice Frankfurter went on to point out that this prohibition rested not on hostility to religion but on the firm belief that the public school system could best serve its proper role in a democracy if it remained free of religious entanglements. He said.

"The sharp confinement of the public school to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of

Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice." 333 U. S. 203, 216-17.

Mr. Justice Frankfurter's concurring opinion concluded with the firm statement:

"We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.' *Everson v. Board of Education*, 330 U. S. at 59. If nowhere else, in the relation between Church and State, 'good fences make good neighbors.' " 333 U. S. 203, 232.

The portion of Mr. Justice Frankfurter's opinion which refers to the obvious fact that some forms of religious instruction for school children "could not withstand the test of the Constitution; others may be found unexceptionable", 333 U. S. 203, 231, is in no way inconsistent with the strong expressions recited above. The only specific plans referred to by Mr. Justice Frankfurter in that portion are those in which children receive religious instruction on Saturday and Sunday or in which the school day is shortened one day a week for all pupils, excusing or "releasing" them "to go where they please." 333 U. S. 203, 230. (This latter plan, as he points out, is sometimes known as "dismissed time", and is not the New York plan.) He distinguished these systems by pointing out that they do not contain the vice of placing "the momentum of the whole school atmosphere and school planning . . . behind religious instruction". *Ibid*; see also p. 222, note 14.

This "momentum," then, is the crucial test in Mr. Justice Frankfurter's view. Applying that test in the instant case plainly requires invalidation of the New York program on the admitted facts. It cannot seriously be questioned that, under the New York plan, "the momentum of the whole school atmosphere and school planning is presumably put behind religious instruction . . . precisely in order to secure for the religious instruction such momentum and planning." 333 U. S. 203, 230-31. That is the chief purpose of any released time plan. If it were not, as Mr. Justice Frankfurter noted (at p. 230), the proponents of the plan "might have drawn upon the French system, known in its American manifestation as 'dismissed time'."

D. The Dissenting Opinion of Mr. Justice Reed

Mr. Justice Reed, dissenting in the *McCollum* case, correctly interpreted the two principal opinions as establishing the same test:

"* * * I conclude that their teachings are that any use of a pupil's school time whether that use is on or off the school grounds, with the necessary regulations to facilitate attendance, falls under the ban. I reach this conclusion notwithstanding one sentence of indefinite meaning in the second opinion: 'We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial.' The use of the words 'cooperation', 'fusion', 'complete hands-off', 'integrate' and 'integrated' to describe the relations between the school and the Council in the plan evidences this. So does the interpretation of the word 'aid'. The criticized 'momentum of' the whole

school atmosphere', 'feeling of separatism' engendered in the non-participating sects, 'obvious pressure' * * * to attend', and 'divisiveness' lead to the stated conclusion. From the holding and the language of the opinions, I can only deduce that religious instruction of public school children during school hours is prohibited." 333 U. S. 203, 240-31.

The purported essential differences between the New York and Champaign released time systems, upon which the decision of the Court of Appeals in the present case is based, were clearly presented to Mr. Justice Reed, as to the other members of this Court. His dissenting opinion explained the New York system in specific detail.

Referring to the statutes in California, Indiana, Iowa, Kentucky, Maine, Massachusetts, Oregon, Pennsylvania, South Dakota and West Virginia and taking New York "as a fair example," he stated:

"Since all these states use the facilities of the schools to aid the religious education to some extent, their desire to permit religious education to school children is thwarted by this Court's judgment. Under it, as I understand its language, children cannot be released or dismissed from school to attend classes in religion while other children must remain to pursue secular education. Teachers cannot keep the records as to which pupils are to be dismissed and which retained. To do so is said to be an 'aid' in establishing religion; the use of public money for religion." 333 U. S. 203, 252.

POINT II

The meaning of the First Amendment stated in the *Everson* case and reiterated in the *McCullum* case requires invalidation of the New York released time program even if all of the specific details of that program were not passed upon and decided in the *McCullum* case.

We contend that the *McCullum* case is determinative of the issue raised in the present case. But even if the *McCullum* case had never been decided, we submit that the meaning of the First Amendment as stated by this Court in the *Everson* case would require a determination adverse to the New York released time program.

Under the First and Fourteenth Amendments, the establishment of religion clause was held, by both the majority and minority in the *Everson* case, to mean at least, this: "Neither a state nor the Federal Government * * * can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. * * *. No tax in any amount, large or small can be levied to support any religious activities or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa * * *."

We submit that the New York released time system necessarily and inevitably results in a violation of each of these prohibitions.

A. Preferring One Religion.

Whenever the state undertakes to accord material benefits to religion, the inevitable result is preferential treatment of one or more religions over others. Even if equality is the expressed standard for a particular program of state aid, the translation of the program into reality always brings with it unequal treatment. Non-preferential aid to religious groups may be possible in theory, but it is doubtful if it has ever been achieved in practice.

All the reported cases on the validity of Bible reading in the public schools in which the version of the Bible used is disclosed involved the Protestant version;¹³ most of the cases were suits brought by Catholic parents.¹⁴ Cases involving the wearing of clerical garb by public school teachers, the incorporation of parochial schools into the public school system, the furnishing of free textbooks or free transportation to parochial schools, all involve preferential treatment accorded the Catholic religion.¹⁵

McCullum is typical of the cases in which commingling of Church and State is defended as non-preferential aid despite the fact that preference actually exists. The burden of the argument there was that this Court had erred in interpreting the First Amendment to bar non-preferential aid to religion,¹⁶ and that the Champaign released time system was non-preferential.¹⁷ Nevertheless, the proof established that general Protestant instruction was given in the regular classroom in the presence of the regular

¹³ Keesecker, *Legal Status of Bible Reading*, U. S. Office of Education, Bull. No. 14 (1930).

¹⁴ Johnson and Yost, *Separation of Church and State in the United States*, Ch. 4 (1948).

¹⁵ Cf. *Everson*, 330 U. S. 1, 4, n. 2 (1947).

¹⁶ 333 U. S. 203, 211 (1948); Appellees' Brief in *McCullum* case, pp. 24-86.

¹⁷ Appellees' Brief in *McCullum* case, p. 86: "No preference between religions or between sects has been pointed out * * *"

public school teacher,¹⁸ while Catholic instruction was given in basement rooms¹⁹ and Jehovah's Witnesses and Lutherans were excluded altogether.²⁰

Preferential treatment is as real a concomitant of the New York released time program as it was of the Champaign system. As we show below in Point V, appellants sought to prove on trial that the actual operation of the released time program in New York is preferential and unequal as between religions. But we go further; we urge that the regulations for the permissible operation of the released time program promulgated by the New York State Commissioner of Education *require* preferential and unequal treatment.

Regulation 2 of the Regulations promulgated by the Commissioner provides (R. 15, 29):

"2. The courses in religious observance and education *must* be maintained and operated by or under the control of a *duly constituted religious body or of duly constituted religious bodies.*" (Emphasis supplied.)

This regulation not only imposes upon secular boards of education the responsibility of determining what is or is not a "duly constituted religious body"—a function which, under the Constitution, they may not perform,²¹ particularly in the absence of legislative standards²²—but, in addition, requires those boards to prefer such "duly constituted" religious bodies over those not found to be

¹⁸ Transcript of Record in *McCullum* case, p. 137.

¹⁹ *Id.* at 150.

²⁰ *Id.* at 162.

²¹ *United States v. Ballard*, 322 U. S. 78 (1944); *Watson v. Jones*, 80 U. S. 679 (1871).

²² *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

"duly constituted" and over the religions of those parents who are not affiliated with any religious body.²³

B. Aiding All Religions

Even if the New York released time program could be truly non-preferential and accord equal treatment to all religious groups, it would be, nevertheless, unconstitutional since its operation through the state's compulsory public school system would constitute state aid to religion. Without considering the monetary expense to the state, it can hardly be doubted that the program gives state aid to religion. It is not monetary aid alone which the Constitution prohibits a state from granting to religious bodies, and it is not the monetary expense of a specific released time program which renders it violative of the First Amendment.

Released time is unconstitutional because it is predicated upon and cannot operate without state aid. It requires state power—the use of the state's compulsory education law. The New York statute requires all children not attending parochial or private schools to attend public school for "full time day instruction." N. Y. Education Law, Section 3205, subdivision 1. The state enters into an agreement with willing parents to relieve their children in part from that obligation if they will use the released time to participate in religious instruction. This, we submit, is aid to religion, the third party beneficiary of the agreement, far more valuable than permitting use of public school premises for religious instruction.

²³ The Champaign system was substantially similar. As described by Mr. Justice Frankfurter:

"* * * While a child can go to any of the religious classes offered, a particular sect wishing a teacher for its devotees requires the permission of the school superintendent who in turn will determine whether or not it is practical for said group to teach in said school system." (333 U. S. 203, 226-27.)

To deny this is to deny the very purpose of released time. The promoters of the program have repeatedly stressed the great benefit received by religious groups from the public school system by reason of the operation of the released time program. The Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, urged and was granted the right to intervene in this case because it was, in the words of the New York statute, Civil Practice Act, Section 1298, "specially and *beneficially* interested in upholding" the validity of the released time program.²⁴ (Emphasis supplied.) The International Council of Religious Education, whose Department of Week-day Religious Education promotes released time programs throughout this country, has asserted with pride that use of the public school system as a recruiting agency for religious instruction has been enormously successful.²⁵

Since the purpose and effect of released time is so clearly to aid religion, it is unquestionably unconstitutional under the *Everson* ruling, repeated in *McCorm*, that the state cannot "aid all religions." Those who defend released time admit this in effect when they concentrate their fire on that aspect of the two decisions. For the reasons already set forth by this Court, some of which are reviewed in Point III below, we believe that that ruling was correct and should not now be overturned.

C. Forcing or Influencing Profession of Belief

In operation of the released time program the state also uses its powers to force or influence children to attend religious instruction and to profess religious belief. Appellants' petition alleges (R-20) that "The operation of the released time program has resulted and inevitably

²⁴ *Matter of Zorach v. Clausen*, 195 Misc. 531 (1949).

²⁵ Shaver, *They Reach One-Third*, Dec. 1943, p. 11.

results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction." As we indicate below in Point V, appellants sought to prove, by a trial of the issues of fact, specific instances of such pressure and coercion, not sporadically or in a few schools, but of such widespread and frequent occurrence as to require a determination of inseparability.

Independent of such specific instances, we urge that the very nature of the released time program, operated as it is under the auspices of the public school system and with the manifested approval of the public school authorities, is coercive in effect. What Mr. Justice Frankfurter said of the Champaign system is equally true of the New York system:

"Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these

non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." 333 U. S. 203, 227-8. (Footnotes omitted.)

Other courts have recognized the coercive effect of religious exercises conducted under the auspices of the public school system. The Supreme Court of Illinois has stated:

"The Kentucky and Kansas decisions seem to consider the fact that the children of the complainants were not compelled to join in the exercises as affecting the question in some way. That suggestion seems to us to concede the position of the plaintiffs in error. The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief."²⁶

The Supreme Court of Wisconsin made a similar observation:

²⁶ *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 351 (1910).

45
"When . . . a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to others."²⁷

An Iowa court came to the same necessary conclusion:

"Conceding, for argument's sake, that such attendance was voluntary, in the sense that no requirement or command was laid upon non-Catholic pupils to attend or take part in such exercises, yet, surrounded as they were by a multitude of circumstances all leading in that direction; impelled by the gregarious instincts of childhood to go with the crowd, and impressed with a sense of respect for their teachers, whose religious principles and church affiliation were unceasingly pressed upon their notice by their religious dress and strictly ordered lives, could a reasonable person expect the little handful of children from non-Catholic families to do otherwise than to enter the invitingly opened door of the church, and receive, with their companions, the instruction there given?"²⁸

²⁷ *State ex rel. Weiss v. District Board*, 76 Wisc. 177, 199-200 (1890).

²⁸ *Knagelton v. Baumhover*, 182 Iowa 691, 699-700 (1918). See also *Kaplan v. Independent School District of Virginia*, 171 Minn. 142, 155-56 (1927) (dissent).

"To excuse some children is a distinct preference in favor of those who remain and is a discrimination against those who retire. The exclusion puts a child in a class by himself. It makes him religiously conspicuous. It subjects him to religious stigma. It may provoke odious epithets. His situation calls for courage."

Judge Fuld, in his dissent in the Court of Appeals (R. 135-7), has clearly stated the coercive effect of the New York released time program:

"The statute, the regulations and the pleadings in the record before us similarly make plain the use of the State's compulsory public school machinery, its atmosphere and its momentum. The vice in the use of such machinery to provide pupils for the religious classes is as predominant a factor in the present case as it was in *McCollum* (333 U. S., at p. 212). As in that case, so here, pupils compelled by law to go to school for secular education, *are released for an hour on condition that they attend religious classes*. Accordingly, there is no denying that the program enables religious denominations to divert to sectarian instruction pupils assembled, and time set aside, for secular education by the state's compulsory attendance laws. Moreover, while it is true that the regulations prohibit comment on a pupil's failure to attend the religious classes, the program itself seems bound to exert certain inherent pressures on the pupils to attend. For one thing, there results an inevitable feeling of 'separatism' in pupils 'left behind'—to avoid which few will hesitate to conform to the practices of their fellow students (333 U. S., at p. 227). In addition, the release from the obligation to attend public school for the one hour a week is unquestionably an inducement to register for such courses, for, it has been observed, religious instruction can compete more successfully with arithmetic than with recreation.

"The cooperation of the public school system further serves to assure the attendance at the religious classes of the pupils enrolled therein. The regulations require that 'Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week', together with a statement of the reason for any

absence. Knowledge that an official record is kept of his attendance necessarily places pressure on the child—accustomed as he is to the discipline of school—to attend these religious classes.

“Indeed, the entire vitality of the program lies in the prestige, planning, cooperation and assistance lent by the public school system, which is exactly that fusion and integration of state and religion prohibited by the First Amendment as interpreted by the Supreme Court. While, therefore, there may here be no use of public school buildings and—I am willing to assume—no use of public school funds and but little of the time of public school personnel, no one may dispute that the state affords sectarian groups ‘invaluable aid’ in helping to provide pupils for their religious classes through the use of its compulsory public school machinery. This is more than a ‘friendly gesture’—the phrase is Judge Froessel’s—between Church and State. If ‘Separation means separation, not something less’, if the relation between Church and State is ‘a “wall * * *” not * * * a fine line easily overstepped’ (per Frankfurter, J., concurring, 333 U. S., at p. 231), then, certainly, the New York City program violates the First Amendment.”

This is not a purely theoretical consideration. It is real and immediate to the many groups, organizations and individuals, including appellants here, who have continued to oppose released time after years of experience with its operation. Only fair but firm enforcement of the constitutional guarantee can relieve them and their children of the unconstitutional coercion to which they are subjected.

D. Tax Support of Religious Activities

The New York released-time program also violates the prohibition against use of tax-raised funds “in any amount, large or small, * * * to support any religious

activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Appellants' petition alleges that "administration of the [released time] system necessarily entails use of the public school machinery and time of the public school principals, teachers and administrative staff," and that the "operation of the released time program . . . is a utilization of the State's tax-established and tax-supported public school system to aid religious groups to spread their faith" (R. 20-1). As we indicate below in Point V, appellants sought to prove these allegations by a trial. But beyond that, we submit that, aside from trial evidence of actual operations, the very nature of the program as admittedly authorized by the statute and regulations requires a finding that tax funds are necessarily expended to make the plan effective (R. 29, 30, 31, 34). The program cannot operate without use of the administrative machinery of the school system and the time consuming attention of principals, teachers and school clerks.

It is no answer to argue that the expense to the school system is so small as to fall within the *de minimis* rule. In the first place, an examination into the facts will, we believe, establish that the expense is substantial and continual. But in any event, the *de minimis* rule has no application where State expenditures are attacked as an aid to religion and hence a law respecting an establishment of religion.

The monetary loss suffered by a taxpayer as a result of a slight waste of public funds may be too insignificant to warrant invoking the judicial process to obtain redress,²⁹ at least where the object of the expenditure is not ex-

²⁹ Public Education Association, *Released Time for Religious Education in New York City's Schools*, 1945, p. 14.

³⁰ Cf. *Massachusetts v. Mellon*, 262 U. S. 447, 486-487 (1923).

pressly prohibited by the Constitution. In respect to matters of religious liberty and separation of church and state, however, the quantity of the monetary appropriation is without significance. When a State makes any appropriation, no matter how slight, in aid of religion, religion has come within the cognizance of Civil Government.³¹ Madison well recognized this when he warned: "That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."³² It is, we submit, the fact, not the extent, of State aid which controls.

Even the smallest contribution of State aid brings with it the evils which the separation principle was designed to prevent. It invites conflict among religious groups as to how such aid is to be dispensed. In this case, as in all others we believe, it entails preferential government approval of some sects and not of others.

Finally, small though such aid may be, it is constitutionally objectionable because it is uniquely governmental; and therefore carries with it the coercive power of the State. The time spent by school officials in administering the public schools' necessary contribution to the released time program can be obtained only from the government. For that reason alone, it cannot be regarded as negligible.

E. Governmental Participation in Religious Affairs and Vice Versa

Appellants' petition alleges that the Greater New York Coordinating Committee on Released Time of Jews, Protestants and Roman Catholics, which "was formed to

³¹ Madison's *Remonstrance* (set forth in Appendix to *Everson* case, 330 U. S. 1, 63-72), par. 8. See also *Harfst v. Hoegen*, 349 Mo. 808, 817 (1941).

³² *Id.* at par. 3.

promote religious instruction through use of the public school system * * * cooperates closely with the public school authorities in the management of the program and in promoting religious instruction" (R. 19). By a trial, appellants sought to prove that this cooperation is substantial and mutual.

Moreover, the Coordinating Committee was allowed to intervene, and actively participated, in this action, not as an *amicus curiae* (as was the case with the religious groups in the *McCullum* case), but as a full and equal party. This is a clear judicial recognition, sanctioned by the Commissioner of Education and the New York Board of Education in consenting to the intervention, that the Coordinating Committee is in effect a partner with the public school authorities in the operation of the released time program.

It is such participation by church and state in each others' affairs for the purpose of promoting sectarian religion which this Court in the *Everson* and *McCullum* cases ruled was constitutionally impermissible. It is just such government participation in the affairs of religious organizations and religious participation in the affairs of government which the Fathers of our Constitution sought at all costs to avoid. As Jeremiah S. Black stated in his address on Religious Liberty:

"The manifest object of the men who framed the institutions of this country, was to have a State without religion and a Church without politics—that is to say, they meant that one should never be used as an engine for any purpose of the other * * *. For that reason they built up a wall of complete and perfect partition between the two."³³

The validity of Black's observation is manifest in the position of religious freedom in contemporaneous totali-

³³ *Essays and Speeches* (1886), 51; quoted in *McCullum* case at p. 219, note 8.

tarian states. Wherever the church or the state seeks to use the other as an engine for its own purpose, that is, wherever a state or a church pierces the wall of partition between them, freedom inevitably suffers.³⁴ In this country, religious freedom is secure because neither religion nor the state may use the other as "an engine for any purpose of the other," or, as this Court stated in the *McCullum* case " * * * the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free within its respective sphere."

POINT III

No adequate reason has been presented for this Court to repudiate its interpretation of the First Amendment in the *Everson* and *McCullum* cases.

When the Champaign released time program was presented to this Court in the *McCullum* case, its defenders showed an awareness that the program must fall unless the interpretation of the First and Fourteenth Amendments of both the majority and minority in the *Everson* case was repudiated. The appellees, therefore, argued that historically the First Amendment was intended to forbid only governmental preference of one religion over another, not impartial governmental aid to all sects, and also that the establishment of religion clause was inapplicable as a prohibition against the States. In the *McCullum* case, the Court gave "full consideration" to the arguments presented but said it was unable to accept either of these contentions (333 U. S. 203, 211).

³⁴ Timasheff, *Religion in Soviet Russia, 1917-1942*; Bates, *Religious Liberty* (1945), 2-9, 14-23, 40-49; Binchy, *Church and State in Fascist Italy* (1941).

We submit that the New York released time program, no less than the Champaign system, must fall unless the *Everson-McCollum* principles are repudiated. Realization of this result, we believe, is implicit in the majority opinion of the Court of Appeals in the present case (R. 119-120), and is explicit in Judge Desmond's concurring opinion (R. 129-131). The burden of the latter's opinion is a frontal attack upon the *Everson-McCollum* interpretation of the First Amendment which, he states, has "no basis in the only history which is pertinent: the history of the drafting and adoption of the amendment itself" (R. 129). To Judge Desmond, no "so-called * * * 'principle' of complete separation of religion from government" has ever existed (R. 126). He contends that "an argument contrived for the proposition that * * * release of children from secular schools for religious education amounts to 'an establishment of religion' or prohibits the free exercise thereof * * * construes the First Amendment by ignoring its language, its history and its obvious meaning, and by substituting, for its plain wording and intendment, the metaphor * * * or loose colloquialism of a 'wall between church and State' " which "has never been more than a figure of speech" (R. 127). Judge Desmond's opinion thus adopts an interpretation of the First Amendment which, though twice rejected by this Court, has found ready acceptance and passionate defense in some religious circles.³⁵

³⁵ See. e.g., Statement of Catholic Bishops, *supra*:

"To one who knows something of history and law, the meaning of the First Amendment is clear enough from its own words: 'Congress shall make no laws [sic] respecting an establishment of religion or forbidding [sic] the free exercise thereof.' The meaning is even clearer in the records of the Congress that enacted it. Then and throughout English and Colonial history 'an establishment of religion' meant the setting up by law of an official Church which would receive from the government favors not equally

The issue once more is before this Court and once more the Court is called upon to reaffirm and apply the principles announced unanimously and definitively in the *Everson* case.

Our discussion of that issue is confined to the historical aspect of the Amendment since the opponents of the *Everson-McCollum* principle have argued chiefly that it misreads the intent of the framers. No real effort has been made by them to refute the fact that the principle is necessary to the preservation of religious freedom. Those who, like appellants here, oppose released time and other supposedly non-preferential forms of govern-

accorded to others in the cooperation between government and religion—which was simply taken for granted in our country at that time and has, in many ways, continued to this day. Under the First Amendment, the Federal Government could not extend this type of preferential treatment to one religion as against another, nor could it compel or forbid any state to do so.

"If this practical policy be described by the loose metaphor 'a wall of separation between Church and State', that term must be understood in a definite and typically American sense. It would be an utter distortion of American history and law to make that practical policy involve the indifference to religion and the exclusion of cooperation between religion and government implied in the term 'separation of Church and State' as it has become the shibboleth of doctrinaire secularism. * * *

"We, therefore, hope and pray that the novel interpretation of the First Amendment recently adopted by the Supreme Court will in due process be revised. To that end we shall peacefully, patiently and perseveringly work. * * *

"We call upon our Catholic people to seek in their faith an inspiration and a guide in making an informed contribution to good citizenship. We urge members of the legal profession in particular to develop and apply their special competence in this field. We stand ready to cooperate in fairness and charity with all who believe in God and are devoted to freedom under God to avert the impending danger of a judicial 'establishment of secularism' that would ban God from public life."

See also: O'Neill, *Religion and Education Under the Constitution* (1949); Parsons, *The First Freedom* (1948); Murray, *Law or Prepossession?* 14 Law and Contemp. Problems, 23 (1949); Van Dusen, *God in Education* (1951); Pike, *Secularization and the Church*, Bulletin of General Theological Seminary, June 1951, 21.

ment aid to religion know that true separation is needed as much today as it ever was. It is needed to preserve both government and religion from the evils which commingling of Church and State inevitably bring. For the reasons fully rehearsed in the briefs submitted in the *McCullum* case, we believe that the framers were right in adopting the separation principle and that this Court was right in interpreting it in a manner which gives it full vitality.

A. The Deep Roots of the Separation Principle

The principle of the separation of religion from government and the obligation of neutrality between religious and non-religious groups imposed by that principle are not the recent invention of this Court.³⁶ They are based

³⁶Besides the references in Mr. Justice Frankfurter's concurring opinion in the *McCullum* case, 333 U. S. 203, 218-219, see, e.g., Madison: " * * * strongly guarded * * * is the separation between Religion and Government in the Constitution of the United States." Fleet, *Madison's "Detached Memoranda"*, 3 William & Mary Quarterly 534, 555 (3rd Ser. 1946); Philip Schaff: " * * * the state must be equally just to all forms of belief and unbelief which do not endanger the public safety", *Church and State in the United States*, 10 (1888); Francis Lieber: "It belongs to American liberty to separate entirely that institution which has for its object the support and diffusion of religion from the political government. * * * No worship shall be interfered with, either directly by persecution, or indirectly by disqualifying members of certain sects, or by favoring one sect above others; and no church shall be declared the church of the state, or the established church; nor shall the people be taxed by the government to support the clergy of all churches, as is the case in France"; *Civil Liberty and Self-Government* (1852); James Bryce: "It is accepted as an axiom by all Americans that civil power ought to be not only neutral and impartial as between different forms of faith, but ought to leave these matters entirely on one side, regarding them no more than it regards the artistic or literary pursuits of the citizens. There seem to be no two opinions on this subject in the United States"; *The American Commonwealth*, Vol. 2, p. 766 (3rd ed. 1894); David Dudley Field: " * * * the greatest achievement ever made in the cause of human progress is the total and final separation of church and

on the concept expressed by Madison in the statement that religion is "not within the cognizance of Civil Government,"³⁷ and of the Presbytery of Hanover against the same Assessment Bill which was the subject of Madison's Remonstrance:

"The end of Civil government is security to the temporal liberty and property of Mankind; and to protect them in the free exercise of Religion. Legislators are invested with power from their Constituents for these purposes only; and their duty extends no farther. Religion is altogether personal, and the right of exercising it unalienable; and it is not, cannot, and ought not to be resigned to the will of the society at large; and much less to the Legislature, which derives its authority wholly from the consent of the People; and is limited by the Original intention of Civil Associations * * * 1738

That this principle is based on friendliness to religion rather than on enmity is evident from its warm espousal by religious bodies.³⁹ It is even more evidenced by the position of strength and influence which religion has achieved in the United States under the protection of the

state. If we had nothing else to boast of, we would lay claim with justice that first among the nations we of this country made it an article of organic law that the relations between man and his Maker were a private concern, into which other men have no right to intrude. To measure the stride thus made for the Emancipation of the race, we have only to look back over the centuries that have gone before us, and recall the dreadful persecutions in the name of religion that have filled the world." Quoted in Stokes, *supra*, Vol. 1, p. 37.

³⁷ *Memorial and Remonstrance*, paragraph 8.

³⁸ *American State Papers on Freedom in Religion* (1949), p. 110. See also *Petition of Sundry of the Inhabitants of Rockingham County against the Assessment Bill* (quoted in Stokes, *Church and State in the United States*, Vol. 1, p. 363), " * * * the power of Civil Government relates only to Men's Civil Interests. * * * "

³⁹ *Ibid.* See also, *Petition of the General Committee of the Baptists against the Assessment Bill*, quoted in Stokes, *supra*, Vol. 1, p. 373.

guaranty of religious liberty and separation of Church and State.

By and large, the American people have been faithful to the unique and radical experiment formalized in the "establishment" and religious liberty provision of the First Amendment.⁴⁰ So conclusive was Madison's victory in the Virginia legislature that in the more than a century and a half since the Amendment was adopted, Congress has never enacted—or indeed been called upon to consider—a bill for the support of teachers of religion.⁴¹

B. The Effect of Separation on Religion

Under this system of mutual independence of church and government, religion has flourished in this country to an extent unparalleled elsewhere.⁴² In 1790, not more than

⁴¹ The latest Congressional expression on the question was its enactment in July 1950, of the Organic Act of Guam (Public Law 630 of the 81st Congress), Section 5, subdivision (p) of which provides: "No public money or property shall ever be appropriated, supplied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution or association, or system of religion, or for the use, benefit or support of any priest, preacher, minister or other religious teacher or dignitary as such." In December 1950, resolutions for public aid to religious education and released time were defeated at the White House Mid-Century Conference on Children and Youth. This conference, representing every area of American life, instead affirmed the principle of separation and the preservation of the American secular public school system. *New York Times*, December 1, 6, 8, 1951.

⁴⁰ *Everson v. Board of Education*, 330 U. S. 1, 14. See also, Schaff, *Church and State in the United States* (1885), p. 15:

"To be just, the state must either support all or none of the religions of its citizens. Our government supports none, but protects all."

⁴² By 1830, DeTocqueville could note that "there is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America." *Democracy in America* (1 Amer. ed. 1851), Vol. I, p. 332. A half-century later, Bryce remarked that while the "legal position of a Christian church is in the United

one out of eight Americans⁴³ and possibly as few as one out of twenty-five⁴⁴ belonged to any church. Today, at least one out of every two Americans is a church member.⁴⁵ Mr. Justice Rutledge was clearly right when he stated that complete separation between religion and the state is best, not only for the state, but for religion as well.⁴⁶

C. The Proposed Distortion of the First Amendment

Those who argue that the First Amendment permits non-preferential government aid to religion misread both its terms and its history. They would take an Amendment designed to prevent certain legislative action and convert it into an affirmative grant of legislative power.⁴⁷

Absent the First Amendment, it is clear that Congress has no power to aid religion, preferentially or non-preferentially. As Madison put it, "there is no shadow of

States simply that of a voluntary association or group of associations corporate or unincorporate, under the ordinary law", yet "the influence of Christianity seems to be * * * greater and more widespread in the United States than in any part of western Continental Europe, and I think greater than in England." *American Commonwealth* (1st Ed.) 561. See, also, Schaff, *Church and State in the United States* (1888), p. 55:

"* * * the American nation is as religious and as Christian as any nation on earth, and in some respects even more so, for the very reason that the profession and support of religion are left entirely free."

⁴³ Stokes, *Church and State in the United States*, Vol. 1, 229-230.

⁴⁴ Garrison, *History of Anti-Catholicism in America*, Social Action, p. 9 (Jan. 15, 1948).

⁴⁵ U. S. Department of Commerce, *Census of Religious Bodies*, 18 (1936); *Yearbook of American Churches* (1951 edition), p. 239.

⁴⁶ Dissenting in *Everson* case, 330 U. S. 1, 59.

⁴⁷ See *Powe v. U. S.*, 109 F. 2d 147 (C.C.A. 5th 1940): "That the first ten amendments were intended as limitations on the power of the federal government and are not grants of power to it has been established from the beginning. A flat prohibition against the regulation of a matter in one direction cannot result in endowing Congress with power to regulate it in another direction."

right in the general government to intermeddle with religion.⁴⁸ "The Government," said Madison, "has no jurisdiction over it."⁴⁹ Indeed, there was a strong feeling that the First Amendment was "altogether unnecessary inasmuch as Congress has no authority whatever delegated to them by the Constitution to make religious establishments".⁵⁰ Dissatisfied with the absence of conferred power, the states demanded an express prohibition, which it was the intent of the framers of the First Amendment to supply.⁵¹ The result of adoption of the premise underlying the decision of the court below in the present case would be to turn a prohibition against laws respecting an establishment of religion into a grant of power so passionately sought to be withheld from the Federal Government.⁵²

If this Court were to adopt the limited interpretation of the First Amendment urged by the proponents of

⁴⁸ Writings of Madison, Vol. 5, p. 176. (Hunt ed. 1920).

⁴⁹ *Id.*, p. 132.

⁵⁰ 1 Annals of Congress, 729 (1789).

"But it [the Constitution] is neither hostile nor friendly to any religion; it is simply silent on the subject, as lying beyond the jurisdiction of the general government." Schaff, *Church and State in the United States* (1888), pp. 39-40.

⁵¹ Beard, *The Republic*, 160, 170 (1944): "The Constitution does not confer upon the Federal Government any power whatever to deal with religion in any form or manner. * * * The First Amendment merely confirms the intention of the framers." See also Bancroft's letter to Schaff: "* * * Congress therefore from the beginning was as much without the power to make a law respecting the establishment of religion as it is now after the amendment has passed." Schaff, *Church and State in the United States*, at p. 137.

⁵² See Hamilton's prophetic warning in *The Federalist No. 84*: "I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than was granted. For why declare that things shall not be done which there is no power to do?" *Federalist Papers* 559 (Mod. Lib. ed. 1937).

released time and similar "non-preferential" aid by the State to religion, it would be enacting into the Constitution what the Congress which framed the amendment specifically refused to enact, although it had two opportunities to do so. Twice when the First Amendment was debated in the Senate it was proposed to substitute either of the following for the House versions:

"Congress shall make no law establishing one Religious Sect or society in preference to others, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

And:

"Congress shall make no law establishing any particular denomination or religion in preference to another or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

These versions expressly and unambiguously spelled out the limited interpretation of the First Amendment. Yet both proposals were rejected.⁵³ We feel confident that

⁵³ *Journal of Proceedings of the First Session of the United States Senate*, pp. 63, 70 (for August 25 and September 3, 1791). The text of the Journal entry is as follows:

"The resolve of the House of Representatives * * * was read, as followeth:

"Art. III. Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed."

* * * * *

"The Senate resumed the consideration of the resolve of the House of Representatives on the amendments to the Constitution of the United States.

* * * * *

"On motion to amend Article the third, and to strike out these words: 'Religion, or prohibiting the free exercise thereof', and insert 'No religious sect or society in preference to others':

It passed in the negative.

On motion for reconsideration:

It passed in the affirmative.

On motion that Article the third be stricken out:

It passed in the negative.

'On motion to adopt the following, in lieu of the third Article:

this Court will not write into the Constitution what the Congress which framed the First Amendment specifically rejected.

POINT IV

Invalidation of the released time system would not interfere with freedom of religion nor would it constitute an overruling of *Pierce v. Society of Sisters*.

Much stress is placed in the opinion of the court below on the argument that invalidation of the released time program would violate the religious freedom of those wishing to have their children receive religious education during regular school hours (R. 120-121). The weakness of this argument is exposed by taking it at face value. It requires the conclusion that every state which has failed to institute a released time system is violating the Constitution.

The argument rests on a false premise. It assumes that the purpose of the plan is to give school children an additional hour of free time so that they and their parents can make a free choice, in the exercise of their constitu-

"Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society."

It passed in the negative.

"On motion to amend the third Article; to read thus: 'Congress shall make no law establishing any particular denomination or religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed:'"

It passed in the negative.

"On the question upon the third Article as it came from the House of Representatives:

It passed in the negative.

"On motion to adopt the third Article proposed in the resolve of the House of Representatives, amended by striking out these words, 'Nor shall the rights of conscience be infringed:'"

It passed in the affirmative."

tional freedom, as to religious education. This is not so; were it so, the proponents of released time would not so vigorously oppose the dismissed or free time system under which the school week is shortened one hour *for all children*, those not wishing to participate in religious instruction as well as those who do. Such a plan may well raise no substantial constitutional issue. It would leave parent and child free in matters of religion. It would adequately meet the claim that the public school preempts so much of the child's time as to leave none for religious education. But it would not be released time.

The crucial aspect of released time is not the release of children wishing to partake of religious instruction, *but the non-release of those not wishing to do so*. The effectiveness of the released time program (to the extent that it is effective) rests upon the compulsory school attendance law. It operates only because the state has the power to corral children and require them to obtain secular education for a given number of hours weekly.⁵⁴ Under the released time plan, the state rebates one hour weekly to those children whose parents contract that the rebated hour shall be used exclusively for religious instruction under the auspices of a "duly constituted religious body." Other children are compelled to remain in the public school during that hour. This is real compulsion and real abridgment of freedom; they lie, we submit, not in the invalidation of the released time program but in its perpetuation.

The argument that invalidation of the released time program would be inconsistent with the decision of this Court in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), has

⁵⁴ The New York *Education Law* (Sec. 3205, subdiv. 1) establishes the requirement of "full-time day instruction." The By-Laws of the Board of Education of the City of New York (Sec. 77) define that statutory requirement as five hours of instruction.

been so completely answered by Judge Fuld in his dissent below that we need only quote from his opinion (R. 138-139).

"I perceive no merit in the contention for which *Pierce v. Society of Sisters* (268 U. S. 510), is cited—that a challenge to the released time program is a challenge to the right of parents to control the rearing and education of their children. More specifically, it is urged that, if a parent may insist upon the complete 'release' of a child from any attendance at a public school so as to permit him to pursue his studies in a parochial school, the parent has, *a fortiori*, a right to insist on the release of the child for but a small percentage of school time.

"The argument goes too far. It assumes that, even though the child is enrolled in a public school, the parent has a constitutional right to remove him therefrom for any period and at any time for instruction in sectarian religious courses. The *Pierce* case stands for no such proposition. The Supreme Court there held only that the state cannot constitutionally prevent parents from determining for themselves where their children shall be educated and whether that education shall be sectarian or non-sectarian. No one questions the right of parents to send their children to private or parochial schools of their own choosing. Parents do not, however, have any constitutional right to interfere with the functioning of the public school system or to demand that it serve as an adjunct to a plan of religious instruction. Moreover what the *McColum* case concerned itself with, and what is here involved, is not the right of a parent, but rather a basic limitation on the power of the state. The *McColum* case, as we have noted, invoked the doctrine of separation, not against the parent's right, but against the state's power, and held that the state may not commingle a program of religious instruction with the secular education given in its

public schools. Nothing in the *Pierce* case either negates that doctrine or suggests a contrary conclusion."

Nor, we submit, is there merit to the analogy drawn by the Court of Appeals to the practice of excusing a child who is absent to observe his religious holiday (R. 121). Here, again, we need only quote from Judge Fuld's dissent (R. 140):

"Nor may the released time program be justified as merely another application of the immemorial and unchallenged practice of releasing children from school attendance to permit them to observe their religious Holy Days. The suggested analogy confuses two entirely different and distinct matters. Religious observance of Holy Days necessarily requires attendance at church or temple at stated times which may coincide with the hours otherwise prescribed by law for school attendance. To refuse to excuse children for such religious observance would be a restraint of that freedom of religion, an interference with that liberty of worship, which the Constitution guarantees. (Cf. *West Virginia State Bd. of Educ. v. Barnette*, 319 U. S. 624, *passim*.) Obviously, no such issue is here involved."

POINT V

Even if appellants were not entitled to a judgment on the pleadings, the New York courts erred in denying appellants the opportunity to prove by a trial of the facts that the actual operation of the program necessarily violates constitutional prohibitions.

The decision of the court below is based upon a finding that the New York program differs in material aspects from the Champaign plan declared unconstitutional in the *McCullum* case (R. 116-117). This, of

course, is a finding of fact, and even if it had been made after trial, it would ~~not~~ be binding upon this Court. *Chambers v. Florida*, 309 U. S. 227, 228-29 (1940); *Pierre v. Louisiana*, 306 U. S. 354, 358 (1939). Actually, however, the finding was not made after trial. Indeed, it can hardly be called a finding: It is a dictate rather than a finding—a dictate which the New York courts prevented appellants from challenging by factual evidence upon a trial.

This action of the court below was not merely an erroneous application of state law on a matter of procedure. Under the narrowest possible view of the *McCollum* decision, any released time plan is unconstitutional if, in actual practice, it makes use of public funds and facilities or the coercive effect of the public school machinery. To uphold a released time plan without permitting proof of allegations of such use or coercion is manifest error under the decisions of this Court.

A. The Theory of the Petition

The petition and proceeding in this case are based on two theories: (1) as a matter of law, the New York released time program as authorized by statute and respondents' regulations is unconstitutional; (2) as a matter of fact, the New York released time program, as actually operated, is unconstitutional, whether or not it would be unconstitutional if operated in the manner authorized by the statute and regulations.

The two-fold aspect of appellants' claim was clearly stated in the demands made by them upon respondents. The demands, identical in respect to both appellants and both respondents; read (See Record on Appeal, *Zorach v. Clayson*, 275 App. Div. 774; 300 N. Y. 613):

"My attorneys advise me that [1] such practice of released time, as well as [2] the regulations or

statutes which may authorize them; are invalid in that they violate the Constitution of the United States and the State of New York particularly in the light of the decision of the United States Supreme Court in *People ex rel. McCollum v. Board of Education*.

"I therefore respectfully request that [1] the released time program be discontinued and [2] that you cancel and rescind all regulations purporting to authorize the released time program." (Numerals added.)

The petition herein also clearly shows that appellants attack not only the regulations but the actual practice as well. The prayer for relief demands not only that the regulations be abrogated but that the practice be discontinued:

"WHEREFORE, your petitioners respectfully pray for an order directed against respondents and commanding respondent Board of Education to [1] discontinue the released time program as described in the petition and [2] abrogate and rescind all regulations established by it authorizing such released time program; and further commanding respondent Commissioner of Education [1] to rescind and abrogate the regulations respecting released time established by the Commissioner of Education and to issue an order to respondent Board of Education directing said Board to rescind and abrogate the regulations respecting released time established by it as described in the petition, and [2] to discontinue the released time program as aforesaid; and further granting petitioners such other and further relief as may be just and proper in the premises." (R. 23; Numerals added.)

B. The Factual Assumptions Made by the Court Below

The New York courts have completely disregarded the second aspect of appellants' petition. They have declared that the New York plan operates in a manner which is constitutionally different from that in which the Champaign system operates and have refused to permit appellants to prove the contrary.⁵⁵ In the following table we set forth what the New York courts have declared to be the constitutionally significant differences and what in fact a trial would establish:

New York Courts' Conclusions of Differences Between New York and Champaign Programs

1. The Champaign Plan, unlike the New York Plan, had no underlying enabling statute (R. 90, 116).
2. Under the New York Plan religious training takes place off school property (R. 90, 116).
3. Under the New York Plan the place for instruction is not designated by school officials (R. 90, 116).
4. There is no element of segregation under the New York Plan (R. 90, 116).
5. Under the New York Plan there is no supervision or approval of religious teachers or course of instruction by school officials (R. 90, 116).

What a Trial Would Show

Plainly irrelevant. It is also inaccurate. The Champaign Plan was held to have been authorized by an Illinois statute; if it had not, this Court would not have had jurisdiction of the case on appeal, as it expressly noted (333 U. S. 203, 206).

True.

True.

Appellants deny this and were prepared to prove the contrary.

This is true, but there was no supervision of the course of instruction by school officials in Champaign. Hence, the only difference here is that there is no approval of the selection of the religious teachers.

⁵⁵ The New York courts relied in this connection on a schedule set up in an affidavit submitted in support of respondent Board's answer (R. 24-5, 27, 35-8, 89-91). The purpose of this affidavit, of course, was to put in issue the allegations of the petition.

New York Courts' Conclusions of Differences Between New York and Champaign Programs

What a Trial Would Show

- | | |
|---|--|
| 6. Under the New York Plan school officials do not solicit or recruit pupils for religious instruction (R. 91, 116). | Appellants deny this and were prepared to prove the contrary. |
| 7. Under the New York Plan registration cards are not furnished or distributed by the school and there is no expenditure of public funds (R. 91, 116, 117). | Appellants deny this and were prepared to prove the contrary. |
| 8. Under the New York Plan non-attending pupils stay in their regular classrooms, continuing significant educational work (R. 91). | Appellants deny this and were prepared to prove the contrary. |
| 9. Under the New York Plan no credit is given for attendance at the religious classes (R. 91, 117). | Technically, this is true, but the religious schools report attendance to the public school, under the regulations. See next item. |
| 10. Under the New York Plan there is no compulsion by school authorities with respect to attendance or truancy (R. 91, 117). | Appellants deny this and were prepared to prove the contrary. |
| 11. Under the New York Plan there is no promotion or publicizing of the released time program by school officials (R. 91, 116-117). | Appellants deny this and were prepared to prove the contrary. |
| 12. Under the New York Plan no public moneys are used (R. 91). | Appellants deny this and were prepared to prove the contrary. |

These items merit detailed consideration since they are the basis of the decision of the Court of Appeals foreclosing any factual challenge of the New York released time program.

The Court of Appeals (R. 116) as well as Special Term (R. 90) stated, without a trial, that it was not

true here as it was in Champaign that "pupils taking religious instruction were segregated by school authorities according to their faiths."

Of course, segregation according to religious affiliation is an objectionable practice in the public schools and is a factor specifically noted as significant by Mr. Justice Frankfurter. Appellants, under their allegation of divisiveness (R. 21), were prepared to show on trial that in fact children in New York are segregated in public school buildings and on public school grounds according to their religions, and that Protestant, Catholic and Jewish children form separate lines and groups in the public school building before or upon marching out and going to religious schools. If this segregation is established, it will be clear that the New York plan incorporates one of the most well-recognized objections to released time systems.

The court below recognized that compulsion by public school authorities on children to participate is constitutionally significant, as noted in Mr. Justice Frankfurter's opinion; yet it held without taking evidence that no compulsion exists in connection with the operation of the New York program (R. 116-117). Appellants, however, allege that, in fact, the "operation of the released time program has resulted * * * in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction" (R. 20). A trial is the only method of determining which of these allegations corresponds with the facts.

The court below held that the New York program differs from the Champaign system in that there is no promotion or publicizing of the released time program by school officials (R. 116-117). This finding, obviously, is of constitutional significance and appellants, under the allegation of pressure and coercion (R. 20), were prepared to

show upon trial that in fact announcements are made and the program is promoted by public school authorities in the public school. This proof cannot be foreclosed simply by finding the contrary.

Solicitation or recruitment of pupils for religious instruction by school officials is recognized by the court below to be a material fact in determining constitutionality. It declared that this practice is not engaged in in New York (R. 116). But there is no evidence to support such a declaration and, in fact, under their allegation of pressure and coercion (R. 20), appellants were prepared to show upon trial that such solicitation and recruitment is a frequent, if not common, practice and has been such for the entire period during which the released time system has been in operation in New York.

The New York courts distinguished the New York program from the Champaign plan by finding, again without evidence, that under the New York Plan non-attending pupils stay in their regular classrooms continuing significant educational work (R. 91). This statement is inconsistent with the actual situation prevailing in New York. Appellants were prepared to show upon trial under allegations in the petition (R. 20-21) that in the overwhelming majority of cases no significant educational work is engaged in during the released time period and that, even when such work is done, it must be repeated since, if it is "significant" and not merely "busy" work, the released children cannot be deprived of it.

The courts below found that no registration cards are distributed by the school (R. 116). Appellants were prepared to show upon trial, under the allegations of the petition (R. 20-21), that distribution of cards by public school teachers and principals is a frequent practice.

According to the court below no public moneys are used (R. 117). However, the petition herein alleges that administration of the released time system "entails use of the public school machinery and time of public school principals, teachers and administrative staff" (R. 20). This is, obviously, a constitutionally material allegation of fact. Under this allegation, appellants were prepared to show upon trial that the released time program is an administrative and economic burden and results in the expenditure of substantial moneys by the public school system. This allegation can be proved or disproved only upon a trial.

Since a petition in a proceeding under Article 78 of the New York Civil Practice Act is in effect a complaint and is governed by the rules applicable to an ordinary pleading, appellants alleged only ultimate facts in their petition and avoided the pleading of evidence. New York Civil Practice Act §§1306, 241. Special Term assumed, wholly without basis, that appellants could not produce evidence to support these ultimate factual allegations. Appellants accordingly made a motion for reargument in which they submitted affidavits by numerous witnesses who were ready to testify in court to evidentiary facts in support of these allegations.⁵⁶ The motion for reargument was denied and since, under New York practice, the order thereon is non-appealable, these affidavits are not part of this record on appeal. Nevertheless, this Court can take notice from the published opinion thereon that such a motion was made and that it was supported by affidavits presenting evidence to support the allegations of ultimate fact contained in the petition.

In his opinion thereon Special Term Justice DiGiovanna stated (124 *New York Law Journal*, August 23, 1950 col.

⁵⁶ *Zorach et al. v. Clayson et al.*, New York Supreme Court, Kings County, Kings County Clerk's No. 10327/1948.

5, p. 299; not off. rep.; printed in the Statement as to Jurisdiction herein, pp. 70-1):

"Matter of Zorach (Clauson)—This is a motion for a reargument of a motion heretofore decided by this court which sought to have declared unconstitutional the 'released time' program for religious instruction now in effect in the public elementary schools of this city, and as an alternative request seeking the trial of issues allegedly raised by the petition and answering affidavits. Reargument is sought on two grounds.

* * * * *

The second ground on which reargument is sought is that the court misinterpreted the factual theory of petitioners' proceeding. In support of this motion for reargument there have been submitted one conclusory affidavit of the attorney for the petitioners, one affidavit of a *former* principal, four affidavits of *former* teachers, three affidavits from parents and three from *former* pupils. These affidavits outline what might be termed administrative difficulties."

Quite aside from the affidavits submitted in support of the motion for reargument, the courts below erred in not giving full weight to the factual allegations of the petition which, on an attack for legal insufficiency, must be deemed to be true.

C. The Constitutional Function of a Trial in This Case

Mr. Justice Frankfurter's concurring opinion in the *McCullum* case is itself the clearest authority for withholding judicial approval of any so-called "released time" plan, not constitutionally objectionable on its face, until the manner in which it actually operates is examined, upon being put in issue. His opinion was based on a record made up at a trial, not on pleadings. He stressed the

importance of a "detailed analysis of the facts" 333 U. S. 203, 226.

The facts presented to the Supreme Court in the *McColum* case would have been quite different if, as here, no hearing had been held and the pleadings of respondent school officials had been accepted as true without reference to the petitioner's case. For example, the constitutionally significant fact that the administration of the program involved expenditure of state funds was denied by the Champaign school officials and was established only after trial (transcript in the *McColum* case, p. 52).

In discussing the necessity of a full exploration of the facts, Mr. Justice Frankfurter listed in a footnote some of the fact elements which he deemed necessary to explore in determining the validity of a released time plan:

"Respects in which programs differ include, for example, the amount of supervision by the public school of attendance and performance in the religious class, of the course of study, of the selection of teachers; methods of enrollment and dismissal from the secular classes; the amount of school time devoted to operation of the program; the extent to which school property and administrative machinery are involved; the effect on the public school program of the introduction of 'released time'; the proportion of students who seek to be excused; the effect of the program on non-participants; the amount and nature of the publicity for the program in the public schools" 333 U. S. 203, 225, note 17.

With respect to almost all of these elements, appellants are prepared to present evidence supporting their claim of unconstitutionality. Yet the courts below prevented the production of this evidence and took the self-contradictory course of (1) resolving all the issues with respect

to these elements unfavorably to appellants and (2) holding that appellants' evidence on the same points was irrelevant.

It is, we submit, no answer to say, as did the Court of Appeals (R. 122), that appellants' allegations, or "a great many of" them, "are conclusory in character" and " * * * have been lifted bodily from portions of the *McCollum* opinions" (which, we suggest, is hardly surprising in view of our contention that the two cases are not factually distinguishable). Judge Fuld found the allegations of the petition to be sufficiently well pleaded to withstand a motion to dismiss for insufficiency (R. 140-141). Certainly, there is nothing conclusory about an allegation, to cite one example, that the Greater New York Coordinating Committee, on Released Time of Jews, Protestants and Roman Catholics "cooperates closely with the public school authorities" in managing the program and in "promoting religious instruction" (R. 19, 141), particularly under the New York rule which requires liberality in favor of a pleading on a motion to dismiss for insufficiency. *Dyer v. Broadway Central Bank*, 252 N. Y. 430, 432 (1930).

But even if the allegations are "conclusory" and not well pleaded, the remedy is not dismissal on the merits, but a direction to amend (New York Civil Practice Act §105). By refusing permission to amend, the New York courts have held that so long as the enabling statute is constitutionally unobjectionable, it matters not what the administrative officials do by virtue of the power conferred upon them by the statute. This, we submit, is erroneous under the decisions of this Court.

⁵⁷ The court, however, did not identify which allegations it so regarded or say that they were "conclusions of law". Cf. *Matter of Hines v. State Board of Parole*, 293 N. Y. 254, 258 (1944).

While we contend that both the program as it might operate under the regulations and the program as it does in fact operate are unconstitutional, it is nevertheless true that the latter may be invalid even if the former violates no constitutional prohibition. The principals, teachers and clerks who administer the public school system act under "color of law" and are agents of the state no less than the Commissioner of Education and Boards of Education who promulgate regulations. Conduct of state employees constitutes state action within the restrictions of the Fourteenth Amendment even if it is unauthorized by statute or regulation, or indeed, even if it is expressly prohibited by statute or regulation. *United States v. Classic*, 313 U. S. 299 (1941); *Screws v. United States*, 325 U. S. 91 (1945). As this Court said in the *Classic* case:

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law" 313 U. S. 299, 308.

Constitutionality, we submit is determined not alone by what is said, but also by what is done.

It is no answer to say that if the superintendents, principals, teachers and other officials entrusted with enforcement of the statute and regulations violate them, the remedy is "the initiation of disciplinary proceedings against any of the offending teachers or principals" (R. 122). Appellants were not relying here on isolated, occasional incidents which are properly the subject of administrative discipline. The theory of the petition is not only that coercion, divisiveness, etc. "have resulted" from the operation of the program, but that they "inevitably will result" therefrom and are inherent therein (R. 20-21).

It is for this reason that appellants did not allege in their petition specific instances to support their allegations

of so-called "abuses", which really are inherent in the released time program (although Special Term's erroneous decision compelled appellants to set forth evidence of some of these instances in their affidavits supporting the motion for reargument). Appellants claim that these "abuses" are inherent in the system and that on the basis of evidence to be presented on trial the court must find that operation of the program without incurring these "abuses" is impossible (Cf. cases upholding injunction against all picketing where widespread violations and outbreaks lead to the conclusion that peaceful picketing in the particular dispute is impossible as a practical matter. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287 (1941); *Busch Jewelry Co. v. United Retail Employees' Union*, 281 N. Y. 150 (1939).)

Illustrative of the point we are making is the practice of public school principals and teachers of questioning children or parents of children who absent themselves from released time classes. Under the set of regulations promulgated by respondents, the public school assumes no responsibility for attendance at the church center and principals and teachers may not comment thereon (R. 17-18). Yet, the Public Education Association in a survey conducted in 1942 found that in 16 out of 82 schools visited this regulation was *admittedly* not followed. The results of this survey were made public and unquestionably came to the attention of respondents. Nevertheless, in a follow-up survey made in 1943, the number of schools admittedly not following this regulation had increased to 25 out of 89. Again the results were made public and again a follow-up survey was made in 1945. In this survey, the number of schools admittedly not following the regulation had increased to 33 out of 88 (Public Education Association, *Released Time for Religious Education in New York City's Schools*, June 30, 1945, p. 7). Had appellants been allowed to present their evidence, they would have shown that the number of violations had again

increased. Such evidence, we submit, must lead to the conclusion that, as a matter of law and of fact, the present released time program as actually practiced in New York necessarily and inevitably entails widespread violations of constitutional prohibitions.

Appellants have exhausted their administrative remedy by demanding of respondents that they discontinue the released time program. Demands for elimination of particular unconstitutional acts cannot provide a solution. Even if the particular teacher or principal involved in such an act were disciplined and that specific act discontinued in the particular school, it would have little or no effect upon what we contend is the widespread and inevitable unconstitutional administration of the program. Appellants' contention is that unconstitutional conduct constitutes the warp and woof of the released time program and that it would not alter the basic unconstitutional pattern if we were "to draw a thread from a fabric." Mr. Justice Frankfurter's opinion, 333 U. S. 203, 231.

Conclusion

The decision below, we submit, is erroneous and self-contradictory. On the one hand, it asserts that the New York system was not affected by the *McCullum* decision because the New York system differs materially from the Champaign system. At the same time, it refuses to direct a trial on which it could be established that the New York system does not differ materially from the Champaign system. Appellants claim that as a matter of law the New York system as authorized by the statute and respondents' regulations was invalidated by the *McCullum* decision. They claim also that, at the very least, this Court should direct a trial so that it could be established whether, as a matter of fact, the New York system as actually operated, inevitably violates constitutional restrictions.

Appellants urge, first, that the statute and regulations show on their face and as a matter of law that the re-

leased time plan which they authorize is unconstitutional (and that would be true, also as to the released time practices admitted by respondents). This is an issue not involving controverted facts, which can be decided on the pleadings and papers annexed. If that first point is not sustained, appellants urge, second, that, the New York released time plan in its actual and inevitable operation is unconstitutional. Such an issue, we submit, cannot be decided for or against appellants or appellees without a trial. A final order can thus be granted for appellants on the first point; without reaching the second point and, hence, without a trial. But a final order cannot be given against appellants without deciding both points against them; this requires a trial as to the second point.

Appellants urge that the decision below should be reversed on the ground that the New York released time plan, on the admitted facts, is unconstitutional or, if the Court does not so find, on the ground that the court below erred in failing to permit appellants to prove the contested allegations of their petition.

Today, renewed pressures are being exerted by some, in education and elsewhere, to break down the historic American principle of complete separation of Church and State—to put into the wall of separation a gate here and an opening there. For the good of state and religion, this principle must be maintained firmly and clearly, and must not become entangled in corrosive precedents, sought to be created, one at a time, in the shape of a claimed “exception” to the principle.

Respectfully submitted,

KENNETH W. GREENAWALT,
Counsel for Appellants.

LEO PFEFFER,
EDWIN J. LUKAS,
SOL RABKIN,
of Counsel.

January 1952.

APPENDIX

**Relevant Provisions of New York Education Law,
Art. 65, Part 1, "Compulsory Education"**

(16 McKinney's Consolidated Laws of New York, Part 1,
at pp. 74 et seq.; Sections 3204, 3205, 3210, 3211,
3212 and 3228)

§3204. Instruction required.

1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction.

2. Quality and language of instruction; text-books. Instruction may be given only by a competent teacher. In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English. Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the eleven common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training and the history of New York state.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States.

4. Length of school sessions. a. A full time day school or class, except as otherwise prescribed, shall be in session for not less than one hundred ninety days each year, inclusive of legal holidays that occur during the term of said school and exclusive of Saturdays.

§3205. Attendance of minors upon full time day instruction.

1. In each school district of the state each minor from seven to sixteen years of age shall attend upon full time day instruction.

3. In each city of the state and in union free school districts having a population of more than forty-five hundred inhabitants and employing a superintendent of schools, the board of education shall have power to require minors from sixteen to seventeen years of age who are not employed to attend upon full time day instruction.

§3210. Amount and character of required attendance

1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

2. Attendance elsewhere than at a public school. a. Hours of attendance. If a minor included by the provisions of part one of this article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.

b. Absence. Absence from required attendance shall be permitted only for causes allowed by the general rules

and practices of the public schools. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

c. Holidays and vacations. Holidays and vacations shall not exceed in total amount and number those allowed by the public schools.

d. Exception. In applying the foregoing requirements a minor required to attend upon full time day instruction by the provisions of part one of this article may be permitted to attend for a shorter school day or for a shorter school year or for both, provided, in accordance with the regulations of the state education department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that required by the provisions of part one of this article.

§3211. Records of attendance upon instruction.

1. Who shall keep such record. The teacher of every minor required by the provisions of part one of this article to attend upon instruction shall keep an accurate record of the attendance and absence of such minor. Such record shall show the name, date of birth, name of person in parental relation to the minor, and his latest place of residence. It shall also show his attendance, each day, by the year, month, day of the month and day of the week and hours of the day, and the number of hours of attendance in each day thereof.

2. Inspection of records of attendance. An attendance officer, or any other duly authorized representative of the school authorities, may at any time during school hours demand the production of the records of attendance of minors required to be kept by the provisions of part one of this article, and may inspect or copy the same and make all proper inquiries of a teacher or principal concerning the records and the attendance of such minors.

§3212. Definition of persons in parental relation and their duties; duties of certain minors and other persons.

2. Duties of persons in parental relation. Every person in parental relation to a minor included by the provisions of part one of this article:

a. Shall submit at the time such minor begins to attend upon instruction evidence of age as required for the issuance of an employment certificate, or show that such evidence cannot be produced.

b. Shall cause such minor to attend upon instruction as hereinbefore required, and to comply with the provisions of part one of this article with respect to the employment or occupation of minors in any business or service whatever.

c. Shall furnish proof that a minor who is not attending upon instruction at a public or parochial school in the city or district where the person in parental relation resides is attending upon required instruction elsewhere. Failure to furnish such proof shall be presumptive evidence that the minor is not attending.

§3228. Penalties.

Except as otherwise provided, a violation of part one of this article shall be punishable for the first offense by a fine not exceeding ten dollars, or ten days' imprisonment; for each subsequent offense by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment.

Sup

for

ANDRE
HAR
cons
FRAN
of N

THE G

WENDE
Solic
RUTH
JOHN
Assis

Office - Supreme Court, U. S.

FILED

JAN 26 1952

CHARLES ELMORE CROPLEY
CLERK

LIBRARY

SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1951

No. 431

In the Matter of the Application

of

TESSIM ZORACH and ESTA GLUCK,

Appellants,

an order pursuant to Article 78 of the Civil Practice Act

against

G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA,
ALD C. DEAN, GEORGE A. TIMONE, and JAMES MARSHALL,
trusting the Board of Education of the City of New York, and
JESSE T. SPAULDING, Commissioner of Education of the State
of New York,

Appellees,

directing them to discontinue certain school practices

and

GREAT NEW YORK COORDINATING COMMITTEE ON RELEASED
TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,

Intervenor-Appellee.

BRIEF FOR APPELLEE

COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK

NATHANIEL L. GOLDSTEIN,
Attorney General of the State
of New York,

Attorney for Appellee,

*Commissioner of Education of
the State of New York.*

L. P. BROWN,
for General,

ESSLER TOCH,
POWERS,

ant Attorneys General,

Of Counsel.

SUBJECT INDEX

	PAGE
The Decisions of the Courts Below	1
Jurisdiction	2
Statement of the Case	2
The Issue as to Appellee Commissioner of Education..	3
The Statute	4
The Rules of the State Commissioner of Education...	5
The Policy and Practice in New York State as to Ex- cusable Absences From School Generally	6
The Handling of "Excuses" in New York Schools	9
The Holding of the New York Court of Appeals	10
Summary of Argument	13
I—The statute, and the rules of the Commissioner of Education promulgated thereunder, do not violate any provision of the Constitution.	
If the schools, in their connection with the pro- gram, render some incidental benefit to religion, this Court has held far more direct and tangible assistance to be constitutionally unexceptionable	
14	
The New York Statute and Rules of the Com- missioner Authorize Practice that is Funda- mentally Distinguishable from the Champaign Plan Held Invalid in the <i>McColum</i> Case.....	
26	
II—As to appellee Commissioner of Education, there is certainly no issue of fact to be tried before the constitutionality of the State statute and Com- missioner's rules can be determined.....	
28	
Conclusion	30
Appendix	i

II

AUTHORITIES CITED

CASES	PAGE
Avery v. Alabama, 308 U. S. 444	17
Bradfield v. Roberts, 175 U. S. 291	23
Cochran v. Louisiana State Board of Education, 281 U. S. 370	21, 23
Daniel v. Family Ins. Co., 336 U. S. 220	17
Everson v. Board of Education, 330 U. S. 1	21, 31
Follett v. McCormick, 321 U. S. 573	24
Friedman, <i>et al.</i> v. New York, 341 U. S. 907	23
Illinois <i>ex rel.</i> McCollum v. Board of Education, 333 U. S. 203	11, 12, 16, 26, 27
Kunz v. New York, 340 U. S. 290	24
Matter of Lewis v. Spaulding, 193 Misc. 66; 299 N. Y. 564	26
Marsh v. Alabama, 326 U. S. 501	24
Murdock v. Pennsylvania, 319 U. S. 105	24
People <i>ex rel.</i> Lewis v. Graves, 245 N. Y. 195, aff'g 219 App. Div. 233, aff'g 127 Misc. 135	4, 6, 7, 8, 10, 12, 26
Pierce v. Society of Sisters, 268 U. S. 510	24
Prince v. Massachusetts, 321 U. S. 158	24
United States v. Ballard, 322 U. S. 78	24
Watson v. Buck, 313 U. S. 387	17
West Virginia Board of Education v. Barnette, 319 U. S. 624	15, 25

STATUTES

New York Education Law, Section 3204(4)	6
New York Education Law, Section 3210	2, 3, 4, 6, 8, 14, 26, 27
New York Education Law, Sections 3210-3229	4
New York Education Law, Section 3211(1)	9

MISCELLANEOUS

PAGE

1940 Public Papers of Governor Lehman	7
Public Education Association, <i>Released Time For Religious Education in New York City Schools</i>	20
State of New York Official Compilation of Codes, Rules and Regulations, Vol 1, Regulations of the Commissioner of Education, Art. 17, § 154	3, 5, 7
University of the State of New York, Bulletin 1248	9, 19
University of the State of New York, Manual for Register Keeping	9, 18, i

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 431

In the Matter of the Application
of

TESSIM ZORACH and ESTA GLUCK,

Appellants,

for an order pursuant to Article 78 of the Civil
Practice Act

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY
CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE, and
JAMES MARSHALL, constituting the Board of Education
of the City of New York, and FRANCIS T. SPAULDING,
Commissioner of Education of the State of New York,
Appellees,

directing them to discontinue certain school practices
and

THE GREATER NEW YORK COORDINATING COMMITTEE ON
RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN
CATHOLICS,

Intervenor-Appellee.

**BRIEF FOR APPELLEE
COMMISSIONER OF EDUCATION OF THE
STATE OF NEW YORK**

The Decisions of the Courts Below

The opinions of the New York Court of Appeals are
reported in 303 N. Y. 161.

2

The opinions of the New York Appellate Division are reported in 278 App. Div. 573.

The opinion of the New York Supreme Court, Kings County, is reported in 108 Misc. 631.

Jurisdiction

Jurisdiction was noted in the instant case on December 11, 1951.

Statement of the Case

The appeal (R. 135) is from a final order and judgment of the Court of Appeals, which affirmed (R. 142) a final order of the Appellate Division of the Supreme Court, Second Judicial Department, which had affirmed (R. 103-105) an order of the Supreme Court, County of Kings, sustaining the objections of appellees in point of law to the petition herein, dismissing the petition on the merits as a matter of law (R. 10); denying petitioners' application in all respects and denying petitioners' motion for an order directing a trial in respect to issues of fact (R. 9-10). The cross motion of the intervenor-respondent for a final order dismissing the proceedings on the merits, on the ground that the petition failed to state facts sufficient to constitute a cause of action, also was granted (R. 9).

By these rulings the New York State courts upheld the constitutionality of the practice in New York State, as authorized by § 3210(1-b) of the New York Education Law and Rules of the State Commissioner of Education and as authorized in New York City by the Rules of The Board of Education of the City of New York, of excusing children from the public schools upon request of their parents to enable them to attend classes in religious instruction or

education, outside of school buildings and grounds and under the auspices of the churches of the parents' choice. The statute and Commissioner's Rules permit the excusing of pupils from school for one hour or less weekly for such purpose. Whether or not the pupil remains in school or is excused is entirely voluntary with the child's parents (Op. of Court of Appeals, 303 N. Y. at p. 168; R. 116).

The Issue as to Appellee Commissioner of Education

The issue as it affects appellee Commissioner of Education of the State of New York is whether the provision of New York Education Law, Section 3210(1-b), which declares that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish" and the rules promulgated by the Commissioner of Education, to carry the statutory provision into effect (Regulations of the Commissioner of Education, Article 17, § 154, State of New York Official Compilation of Codes, Rules and Regulations, Vol. 1, p. 683; set forth *infra*) offend the Constitution of the United States.

The petition names two respondents, appellees here, the Board of Education of the City of New York and the Commissioner of Education of the State of New York. The issue is not the same as to both. The allegations of the petition are not all directed against the Commissioner of Education. Some are directed against the Board of Education of the City of New York.

There are more than 3000 school districts in New York State, of which New York City is just one. Conceivably the rules of some district might violate the statute and rules of the Commissioner of Education. Conceivably the actual operation of the program in some district might be in violation of its own rules. Such disobedience might well

"warrant the initiation of disciplinary proceedings against any of the offending teachers or principals" (Op. of Court of Appeals, 303 N. Y. at p. 174; R. 122) or local school authorities. It "would in nowise warrant" (cf. Op. of Court of Appeals, *id.*) holding the law and rules of the Commissioner unconstitutional.

This brief is on behalf of the Commissioner of Education only, in support of the statute and the Commissioner's rules. Therefore, while we are in accord with the position of the Board of Education of the City of New York upon all issues concerning the Board, our argument will be limited to the issue relating to the Commissioner of Education, as stated *supra*.

The Statute

Section 3210 of the Education Law—which is a part of the Compulsory Attendance Law of the State of New York (Education Law, Article 65, Part I, §§ 3210-3229)—gives legislative approval to a practice which had, prior to the adoption of the law in 1940*, been followed in the State by local school authorities acting under their general discretionary power as to school sessions and attendance (*infra* pp. 6-8).** The law provides in subdivisions 1-a and 1-b as follows:

"§ 3210. Amount and character of required attendance

1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed

* The provision first came into the statute by amendment of former § 625 of the Education Law by Chapter 305 of the Laws of 1940. The section has since been renumbered 3210.

** The practice was held constitutionally valid by the Court of Appeals in 1927, *People ex rel. Lewis v. Graves*, 245 N. Y. 195, *infra*, a case involving the practice as adopted in the City of White Plains in 1925.

where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

The Rules of the State Commissioner of Education

The rules of the State Commissioner of Education adopted on July 4, 1940 to implement the statutory provision, and now remaining in full force and effect provide as follows:

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools." (Regulations of the Commissioner of Education, Art. 17, § 154; State of New York, Official Compilation of Codes, Rules and Regulations, Vol. 1, p. 683)

The Policy and Practice in New York State as to Excusable Absences From School Generally

Always there have been and still are (*infra*, pp. 9-10) many excusable absences from compulsory school attendance in New York State.

In fact, the compulsory education article of the Education Law does not fix the number of hours to constitute a school day. That is left to the local school boards. Only the number of days in a school year, which in a full time day school must be not less than 190 days, is provided (Education Law § 3204[4]).

The Commissioner of Education sets for the local boards of education the general policy as to excusable absences. Discretion has rested, and now rests, with local boards of education to permit absence for other reasons. Excusable absence for religious instruction came within this discretion prior to 1940. Local boards of education adopted the practice of permitting absences therefor on some particular day and hour. The plan in the City of White Plains, New York, which was similar to plans then operating elsewhere in the State, was upheld, as stated *supra*, by the New York Court of Appeals in *People ex rel. Lewis v. Graves*, *supra* 245 N. Y. 195, *aff'g* 219 App. Div. 233, which had affirmed 127 Misc. 135.

By 1940, the practice of excusing public school children from attendance upon instruction for this purpose and in this manner had become more widespread. To obtain orderliness of practice and the adoption of statewide rules governing such excuses, the Legislature enacted what is now Education Law, Section 3210, subdivision 1-b (L. 1940, c. 305), providing that "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

That this statute, here under attack, was merely a legislative recognition of the practice approved in the *Lewis* case (*supra*), is unequivocally certain from the message of Governor Lehman approving the legislation (1940 Public Papers of Governor Lehman, p. 328):

"Under this bill the State Commissioner of Education shall establish rules under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education.

"For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: 'Neither the Constitution or the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.'

"However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agency of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules.

"A few people have given voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

In accordance with such statutory authority the then Commissioner of Education promulgated the Rules set forth, *supra* p. 5. The organization of the school sys-

tem of the state, the sphere of supervision of the State Department of Education and the sphere of discretion of local school authorities is in general no different today than it was in 1940, and was no different in 1940 than it had been in 1927 when the Court of Appeals held valid in the *Lewis* case (*supra* 245 N. Y. 195) the practice of excusing absence for religious education. And, as we have said, that practice is not altered under the statute and Commissioner's Rules from the manner in which it was conducted prior to 1940 when they were adopted.

Prior to the 1940 enactment of the statutory provision now in Section 3210 of the Education Law; and today—no differently—the Education Law of this State provided and provides for compulsory attendance of all minors of certain ages upon instruction at public school or elsewhere; for some mandatory courses of study; for the minimum number of days schools must remain in session during each year, but not the number of hours per day attendance is required. The hours of attendance were and are determined solely by local school authorities, subject only to the powers of the State Commissioner to insist upon adequate instruction in each school under his supervision.

The compulsory attendance law (Education Law § 3210) does not, as it did not prior to 1940, demand attendance at all times without exception. Local boards of education and other local school authorities are today, as they were prior to 1940, and prior to 1927, authorized and empowered to excuse pupils from attendance upon instruction for any period of time (hours or days) for "legal" or reasonable cause. Today, as then, many matters outside the province of education authorities but of importance to the child or his parent—including religious affairs—are recognized as such "legal" or reasonable causes (*infra*, pp. 9-10; Appen-

The Handling of "Excuses" in New York Schools*

Education Law, Section 3211(1) provides that teachers "shall keep an accurate record of the attendance and absence" of every minor pupil. Such record must show "his attendance, each day, by the year, month, day of the month and day of the week, and hours of the day and the number of hours of attendance in each day thereof."

Pursuant to this section a register is kept by each teacher in which, in accordance with specific directions (see, *Manual for Register Keeping*, Appendix, *infra*, pp. I *et seq.*), is entered "the tardiness or absence of each pupil with symbols to indicate whether such absence is for legal or other than for legal reasons" (Bulletin 1248, University of the State of New York, p. 22). There the teacher records all absences including the particular excusable absence which this petition attacks (*id.* pp. 22, 29).

All excusable absences are recorded in this one fashion.

The recording of the excusable absence for religious instruction is treated in this usual routine manner.

In support of the answer in the present proceeding, which pleaded that the statute and regulations of the Commissioner of Education do not offend the Constitution, the Commissioner of Education attached an affidavit (R. 534) in which he set forth the manner in which the Department of Education, in exercising its duty of general supervision of the compulsory attendance provisions of the Education Law, provides for the recognition of *bona fide* excuses from school attendance: — the department

"has prepared and distributed bulletins containing digests of the applicable statutory provisions, regula-

* This subject is further discussed in point I. *infra*.

tions promulgated thereunder, rules of procedure and forms for the information, assistance and guidance of local school authorities in such matters; that in the matter of the recognition of *bona fide* excuses which may be accepted as proper, warranting absence from attendance upon instruction in all schools, the Department has advised local school authorities that the following are among those that may be so accepted (Bulletin No. 1248, University of the State of New York, July 1, 1943, pp. 30-32):

- Sickness of the pupil
- Sickness or death in the family
- Impassable roads or weather making travel unsafe
- Religious observance
- Quarantine
- Required to be in court
- Religious instruction or education
- (Regulation of Commissioner of Education, § 154)
- Approved instruction in music"

The affidavit further stated that granting of individual excuses (R. 55) and the conduct of released time programs "in accordance with the requirements" of the regulations of the Commissioner of Education are solely within the province of the local school authorities. Attached as exhibits (R. 56-63) to the affidavit are letters selected at random from local school authorities throughout the State, containing descriptive summaries of released time practices in various localities, as representative of those generally prevailing throughout the State.

The Holding of the New York Court of Appeals

The opinion of the Court was by Judge Froessel, concurred in by Judges Lewis, Conway and Dye. Chief Judge Loughran concurred in the decision upon the authority of *People ex rel. Lewis v. Graves, supra*, 245 N. Y. 195. Judge Desmond concurred in a separate opinion. Judge Fuld dissented in an opinion.

The majority opinion held that the New York program in nowise violated the Constitution; that it neither constituted a prohibited establishment of religion nor offended the guarantee of freedom of religion; that there is no use of tax-supported property or credit or public money directly or indirectly in aid or maintenance of religious instruction (303 N. Y. at pp. 168, 169; R. 116, 117).

The Court enumerated the features of the Champaign plan (before this Court in *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203), which it held "differed radically" from the New York practice, viz.: "There was no underlying State enabling act. Religious training took place in the school buildings and on school property. The place for instruction was designated by the school authorities. Pupils taking religious instruction were segregated by school authorities according to faiths. School officials supervised and approved the religious teachers. Pupils were solicited in school buildings for religious instruction. Registration cards were distributed by the school, and in one case printed by the school" (303 N. Y. at p. 168; R. 116).

"None of these factors," said Judge Froessel, "is present" in the New York program (id.).

Pointing out that Mr. Justice Black, writing for this Court in the *McCollum* case, had stated that the "foregoing facts": "show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting

* That is, the characteristics of the program as practiced, there being no statute in Illinois prescribing what the program must be as there is in New York. In New York the "facts" of the program, its elements, are the statute and rules of the Commissioner of Education. It is to these alone that the constitutional test is to be applied.

religious education," the Court held—construing the New York statute and the Commissioner's rules—that, on the contrary, in New York there was no such use of tax-supported property or cooperation in promoting religious education (303 N. Y. at p. 169; R. 117).

Again construing the statute and rules, the Court held the present program in New York substantially the same as the one held constitutionally valid in *People ex rel. Lewis v. Graves, supra*, except for the presence now of the State enabling act. (303 N. Y. at p. 170; R. 118).

For the very reason that "the public school must be kept separate and apart from the church" and therefore that "pupils may not constitutionally receive religious instruction therein," the Court held that the New York program is valid because "all that New York parents ask then is that their children may be excused one hour a week for that purpose" (303 N. Y. at p. 173; R. 121).

Prior to the instant proceeding, the same Lewis who had been the plaintiff in *People ex rel. Lewis v. Graves, supra*, 245 N. Y. 195, brought a proceeding in 1948 to have the present program, under the statute and rules of the Commissioner of Education, held unconstitutional. The New York Supreme Court, Mr. Justice Elsworth, upheld the law (193 N. Y. Misc. 66) and dismissed the petition. Appeal from this decision was taken directly to the Court of Appeals. On the day of the argument and after the filing of briefs, the appeal was discontinued by the appellant in open court (299 N. Y. 564). Mr. Justice Elsworth, too, had pointed out, construing the New York statute, that unlike the Champaign plan held unconstitutional in the *McColum* case, the New York program "entails no use of the school

buildings for the religious instruction, nor is there any expenditure of public funds for that purpose" (193 Misc. at p. 73).

Summary of Argument

I—The statute, and the rules of the Commissioner of Education promulgated thereunder, do not violate any provision of the Constitution.

If the schools, in their connection with the program, render some incidental benefit to religion, this Court has held far more direct and tangible assistance to be constitutionally unexceptionable.

II—As to appellee Commissioner of Education, there is certainly no issue of fact to be tried before the constitutionality of the State statute and Commissioner's rules can be determined.

This appeal having been scheduled for oral argument on January 30, the time element has necessitated the completion of this brief before receipt of appellants' brief, and therefore without knowledge of the course which appellants' arguments may take in this Court.

The statute, and the rules of the Commissioner of Education promulgated thereunder, do not violate any provision of the Constitution.

If the schools, in their connection with the program, render some incidental benefit to religion, this Court has held far more direct and tangible assistance to be constitutionally unexceptionable.

By Section 3210(1-b) of the Education Law, New York State permits children to be excused from school (1) for religious observance and (2) for religious education, under rules that the Commissioner of Education shall establish. The statute does not differentiate in any way between excuse for religious observance and excuse for religious education.

This is the statute that is before the Court at this time. The only program that is authorized in New York State is pursuant to the provisions of this statute. The determination of this case, therefore, it is respectfully submitted, must be whether this statute directs or authorizes any practice which offends the Constitution of the United States.

The statute is, as it declares in so many words, an enactment permitting *absence from* school for the purposes stated.

Pursuant to it, pupils may be excused to permit them to observe religious holy days. This is in accord with an "immemorial and unchallenged practice" (Dissenting Op. Court of Appeals, 303 N. Y. at pp. 191-2; R. 140). To refuse to excuse children for religious observance would, as that opinion went on to say, "be a restraint of that freedom of religion, an interference with that liberty of worship,

which the Constitution guarantees. (Cf. *West Virginia State Bd. of Educ. v. Barnette*, 319 U. S. 624, *passim*.) (See also Op. of the Court, 303 N. Y. at p. 173; R. 121).

Since that is undeniably so, it is not seen how a contention can be sustained that the same statute permitting in the same words excuses for absence for religious "education" is unconstitutional. Both absences are obviously from school attendance during hours in which there are school sessions. Otherwise there would be no reason for or purpose in the law.

All of the arguments appellants have made to excusable absence for religious education would, if they had merit, apply with greater force to excusable absence on religious holy days. If the former is benefit to religion, so is the latter. If the former is divisive so is the latter. In fact more so. For in order to attend weekday religious classes all children of all faiths are excusable at the same time. Holy days of various religious faiths, on the other hand, fall at different times and the children of a particular faith only are absent on a particular day. If there is no constitutional objection to the permission that the statute authorizes for excusable absence during regular school sessions for religious observance on holy days, it is difficult to see how the same statute becomes invalid when under it pupils are excused once weekly for religious education—also outside the school buildings.

As directed by the statute, the Commissioner of Education has promulgated the rules set forth, *supra* (and in the Court of Appeals opinion, 303 N. Y. at pp. 166-7; R. 114-115). These rules prescribe that the instruction, for which the absence may be requested by a parent or guardian, is to be had "outside the school buildings and grounds"; that a copy of the pupil's registration for the religious

classes must be filed with the school authorities and that report of his weekly attendance must be filed with his principal or teacher; that only one hour's absence a week for this purpose may be excused; and that such hour each week must be at the close of a school session at a time fixed by the local school authorities in the district or municipality. Wherein is there any intrusion of religion or religious instruction upon school premises or into school curriculum by the provisions of the statute or the rules of the Commissioner of Education?

If appellants in this Court take the same position that they did in the state courts, their argument will be chiefly against released time generally as a concept, as being in conflict with separation of church and state, rather than specifically against the New York statute. This Court, however, will not rule upon the constitutionality of a concept. As Mr. Justice Frankfurter said in the *McCollum* case (333 U. S. at p. 225), "Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. . . . It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court".

The question before this Court in the instant case is then: Do the statute and the rules of the Commissioner establish such a relation between the public educational system and religious instruction as to violate the First Amendment to the Constitution? We submit that they do not; that appellants have not shown and cannot show that they do.

Appellants in support of their broad and general attack have, in the state courts, cited one reason or another that

various groups give for disapproving released time programs—not necessarily the New York program. These, however, are declarations of some people's point of view as to the desirability of excusing children from school for religious education. But whether a State statute is "conducive to good or evil for the people" of the State (Mr. Justice Black in *Watson v. Buck*, 313 U. S. 387 at p. 403; and at p. 447, *Atterry v. Alabama*, 308 U. S. 444), whether it is desirable or not (*Daniel v. Family Ins. Co.*, 336 U. S. 220 at p. 225) are questions which this Court habitually leaves to the state legislature. The citizens of New York as represented in the State Legislature of New York were of the opinion that children should be excused for this purpose if their parents wished it. They thought so by a vote of 46 to 1 in the New York State Senate, and a vote of 132 to 7 in the Assembly.

The primary tangible argument appellants have made is that some opponents of released time programs contend that it imposes a heavy administrative burden on the school system. The answer to that is that in New York State the "burden" is merely the recording of the excuse as part of the routine keeping of the child's attendance record. The amount of administrative time devoted to it is minuscule when the teacher is keeping an attendance register for the class for some 190 days of the school year, recording the presence of each child for the entire school day, presence for a single session, tardiness for one or both sessions, absence for some dozen common "legal", that is, validly excusable absences, and absences classified as "illegal." The slight chore for the teacher in recording, as part of this duty of keeping each child's attendance record, the excusable absence once a week for outside religious education is, it is readily apparent, incapable of measurement as to the

time spent in making the record. Certainly the time so spent is so infinitesimal that it could not be calculated in cost to the school system.

As a matter of fact, all that the teacher has to do in New York State is to note a symbol. In New York State each teacher has a Register of Attendance supplied by the State Department of Education. In it the teacher enrolls the names of all pupils. There are pages with boxes for each day of the school year. In such boxes the teacher must record the pupil's presence or absence for the day (recording any absence for part of the day) in symbols, pursuant to direction contained in the *Manual For Register Keeping* which the State Department issues. In the Appendix to this brief we have reproduced excerpts from this manual.

Such is the extent to which the teacher's time and the public money is expended under the New York program for excusable absence to attend the religious classes. The teacher jots down a symbol next to the name of the pupil who is absent for the last hour in the afternoon of one day a week in order to attend religious classes away from the school, as the teacher notes a symbol when the pupil is tardy or absent all or any part of the day for any of the dozen or more recognized excuses.

The recording of the absence for attendance at religious education is not to lend aid to the religious class, but as part of keeping the attendance record. The importance of the attendance record looms so large in the operation of the school system that the elaborate and minute instructions for their keeping, already referred to (and see Appendix), are issued by the Department of Education to local school authorities. A child may not be recorded as present unless physically present. He may not be recorded as present

even if he is absent because taken under school auspices to a museum or on other supervised educational expeditions; he is recorded as absent with a designated symbol, "Ed" (see Appendix). The Department's Bulletin on compulsory attendance (*supra*, op. cit. No. 1248) warns (p. 22) "the register record must show just what happened in connection with the attendance of each child." Therefore, the school must, in connection with the absence of a child excused for religious education, satisfy itself "that the excuses are not taken advantage of and the school deceived, which is, of course, the same procedure the school would take in respect of absence for any other reason" (Op. of Court of Appeals, 303 N. Y. at p. 169, R. 117). In the case of any excusable absence, the child must bring a written statement from the parent (op. cit. Bulletin No. 1248, p. 29) of the reason for the absence, frequently required to be supported by a statement from the doctor. Accordingly, the Commissioner's rules require that pupils must file a copy of their registration at the religious class with the school and report of their actual presence at the class each week.

Appellants will probably contend in this Court, as they did in the state courts, that there is represented in the acceptance and recording of the excuse a relation between the school and religion which there should not be. If it can be conceived to be a contact between the school and religion to accept an excuse for absence to attend religious classes in common with the excuses for attendance at music or the dentist or appearance in court or at a clinic, it is assuredly a modicum of assistance to religion in comparison to assistance or participation held constitutionally proper (cases *infra*).

Appellants have also in the State courts referred to the "momentum" of the compulsory attendance system put behind religious instruction; they urged a child's inclination to join in leaving school for the hour if his fellows do likewise. Perhaps there was a tendency in this direction when in Champaign, Illinois, the religious teachers came into the schools, but it has been shown on behalf of appellants that a relatively small percentage of children participate in the program in New York City, for example. In the Court of Appeals an organization filing *amicus curiae* in behalf of appellants' position presented a study* (Public Education Association, *Released Time For Religious Education in New York City Schools*) it had made which indicated that there was a far larger proportion of the student body who did not avail itself of the excuse privilege than who did, and that participation in the program was tending to decrease. So that apparently the "momentum" of the compulsory attendance system is proving to be a fairly weak force behind the program.

Again, if going to a class in religious education outside of school is more attractive than a class in school, or if the fact that the boy or girl at the next desk goes proves a lure to his neighbor, it requires a great deal of ratiocination to establish even a tenuous relation between the compulsory attendance system and the child's desire or willingness to attend religious classes outside the school. If a preference for a religious class over the schoolroom or the desire of the child to do what his schoolmate does, in some intangible degree are encouragement to children to attend religious classes, that constitutes but remote benefit to

* Demonstrating the complete disassociation of the public school system from weekday religious education is the fact that the Department of Education has never compiled any statistics of absences excused for religious education.

religion, far less significant than benefits held by this Court to be constitutionally proper as being incidental or minor.

The conspicuous decisions of this Court to this effect are *Everson v. Board of Education*, 330 U. S. 1, and *Cochran v. Louisiana State Board of Education*, 281 U. S. 370.

In the *Everson* case this Court held it not to be a violation of the First Amendment for the State of New Jersey to authorize the use by a municipality of public money to transport children by bus to church schools. This was upheld against the argument that the State was thereby imposing taxes in support of a religion, thus violating the constitutional prohibition against establishment of religion (pp. 7-8). The reasons that compelled the Court to hold the New Jersey statute not unconstitutional are apposite here. Mr. Justice Black there said that while New Jersey could not consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches "the tenets and faiths of any church," "on the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion"* (p. 16). Mr. Justice Black went on to say that "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State" (p. 17). Mr. Justice Black recalled (at pp. 9-11) that the genesis of the First Amendment was the protest of the peo-

* Thus the exercise of religion includes freedom to give children a religious education.

ple of the day against the requirement of some colonies that everyone support government sponsored churches and that the purpose in adopting it was to provide protection against "governmental intrusion on religious liberty" (p. 13). Mr. Justice Black then cautioned that "we must not strike" a state statute down "if it is within the State's constitutional power even though it approaches the verge of that power" (p. 16). Pointing out that if numerous public services were cut off, which church schools generally receive, it would make it more difficult for parents to send their children to such schools or cause them to be reluctant to do so, Mr. Justice Black concluded: "But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them" (p. 18).

The statute and rules of the Commissioner of Education here before the Court rigorously forbid any intrusion of religion on public school property or in the public school curriculum. On the contrary, it would be a violation of the freedom of religion guaranteed by the First Amendment to deny the people's desire, as manifested in the statute, to exercise their religious liberty to obtain the excusing of their children from school for religious attendance, for one hour of the 25 hours a week children commonly spend in school. Even if the people through the Legislature have adopted a statute which "approaches the verge" of the limit of permissible contact between the school and religion, it has not gone over the verge, and the courts may not therefore strike this statute down.

If thoughtful and responsible persons deem this practice undesirable, it is for them to win popular support to their view so that parents will not request that their children be excused for this reason.

A statute which manifestly comes much closer "to the verge" than the New York excusable absence program, is that upheld unanimously by this Court in *Cochran v. Board of Education*, 281 U. S. 370. There the Louisiana statute provided for the purchase with public moneys of books to be supplied free of cost to all school children of the State, including those attending church schools.

Again, in *Bradfield v. Roberts*, 175 U. S. 291, this Court upheld the appropriation of money by Congress for the construction of hospital buildings operated by the Roman Catholic Church.

The First Amendment is not regarded in popular understanding or by judicial construction as outlawing every recognition of religion which carries with it from state to church some resultant benefit.* In some instances the resultant benefit is substantial, as in the tax exemption of church property. Of some benefit to religion must be (else the ceremony is meaningless) the opening of sessions of Congress, state legislatures and many public functions with a prayer by a clergyman, and the taking of an oath with a hand on the Bible by witnesses in all courts. The service of chaplains in the armed forces, and many more accepted and unquestioned practices will immediately occur to the Court which involve a very direct connection between church and state. This Court at its last term (April 16, 1951) dismissed "for the want of a substantial federal question" an appeal in *Friedman, et al. v. New York*, 341 U. S. 907, a case where the Court of Appeals of New York

* Virtually all such recognition entails the use of some public money.

(302 N. Y. 75) had upheld a Sunday law notwithstanding the argument that separation of church and state compelled the invalidation of the law.

The separation of church and state does not forbid these recognitions of religion by the State. Instead, the constitutional guarantee of religious liberty calls for them. Parents asking that they may obtain the excuse of their children one hour a week from school for the purpose of attending classes in religious education outside the school, are, too, asking but to be permitted the free exercise of the constitutional guarantee of freedom of religion. No constitutional guarantee receives greater protection by this Court than that of the right freely to follow and practice one's religious faith, for truly this country was founded in the search for that freedom. And to hinder it is repugnant to our ultimate and most treasured constitutional guarantee.

This Court has sheltered the right to religious freedom, even when the manner in which it was exercised must have impressed it as reprehensible (*Kunz v. New York*, 340 U. S. 290). The decision in the *Kunz* case was another in a continuity of decisions and declarations to the effect that the First Amendment "has a dual aspect," and not only "forestalls the compulsion by law" of the acceptance and practice of any form of religious faith but safeguards the right to the free exercise of the faith of one's choosing (*United States v. Ballard*, 322 U. S. 78; *Marsh v. Alabama*, 326 U. S. 501; *Follett v. McCormick*, 321 U. S. 573; *Murdock v. Pennsylvania*, 319 U. S. 105).

This Court has been particularly assiduous in leaving to parents the freedom to rear and educate their children in their own religious faith (*Pierce v. Society of Sisters*, 268 U. S. 510, and see *Prince v. Massachusetts*, 321 U. S. 158).

In *West Virginia Board of Education v. Barnette*, 319 U. S. 624, the successful attack upon a mandatory requirement, that children in the public schools salute the flag and pledge allegiance, was made by members of Jehovah's Witnesses who contended that this violated their religious beliefs which include literal observance of the Second Commandment. Children had been expelled from school for refusal to participate in the ceremony, had been regarded as unlawfully absent and their parents as subject to prosecution.

Mr. Justice Jackson in that case carefully noted (p. 630) that the refusal of these children to participate in the ceremony "does not interfere with or deny rights of others to do so." The ceremony was not ordered discontinued by this Court; merely that the compulsion upon children to participate be ended. The children were thus permitted the right to distinguish themselves from their classmates in the exercise of their religious liberty.

That is what the children who choose to leave school to attend religious education classes ask to be permitted to do. They "do not interfere with or deny rights of others" to refrain from availing themselves of the exercise privilege. Appellants, as we have observed, *supra*, have cited statistics which show that it is the smaller percentage of children who leave to attend religious classes. The greater part of the student body does not. To deny the number who desire to go, or whose parents desire that they go, the right to do so is to interfere with their free exercise of religious liberty.

The New York Statute and Rules of the Commissioner Authorize Practice that is Fundamentally Distinguishable from the Champaign Plan Held Invalid in the McCollum Case.

Appellants will undoubtedly argue in this Court, as they did in the State courts, that their case comes within the decision of this Court in *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203. The present proceeding and before that the proceeding in *Matter of Lewis v. Spaulding*, (193 Misc. 66; 299 N. Y. 564) were occasioned, as appellants have declared, by that decision. Until then, no one after the adoption of Section 3210(1-b) in 1940 deemed that it authorized anything differing from the program held constitutionally valid in *People ex rel. Lewis v. Graves*, *supra*, 245 N. Y. 195, and no attack had been made upon the law. Not only were appellants moved, by the *McCollum* decision, to bring the instant proceeding, but they have argued in the State courts, as they may here, that this Court, aware of the existence of the New York law through the medium of an *amicus curiae* brief filed in the *McCollum* case (by one of the attorneys for intervenor-appellee in the present case), intended some of the language in the opinions in that case to be rulings upon the constitutionality of the New York law.

This Court does not need us to say for it that it decides only the case at bar and judges the constitutionality of no statute but one in litigation before it.

Contrary to statements appellants have made in briefs and oral argument in the State courts, the several opinions in the *McCollum* case very explicitly confine that decision to the practice in Champaign, Illinois, which was then before the Court, and in so many words declare that programs which do not go "beyond permissible limits" (333

U. S. at p. 237, also at p. 225), as the program in Champaign, Illinois did, might well be found constitutionally altogether proper.

The issue argued in the *McCollum* case, the issue there decided, was the constitutional propriety of having religious instruction in the public school buildings, of bringing religious teachers into the public school rooms. The basis and essence of the decision was "the use of tax-supported property for religious instruction" (333 U. S. at p. 209). "Use of tax-supported property" under the Champaign plan meant the physical use of the school structures, and it meant more. It meant sectarian religious instruction in the public schools. In fact, the sole prayer for relief in the *McCollum* petition was that the defendant Board of Education prohibit

"all instruction in and teaching of religious education in all public schools in Champaign School District Number 71, Champaign County, Illinois, and in all public school houses and buildings in said district when occupied by public schools." (Record in Supreme Court of the United States, p. 17; quoted in part in the opinion at p. 205; emphasis supplied)

Not this fundamental feature of bringing sectarian religious instruction into the public schools nor any of the details thereof and stemming therefrom, which constituted the "close cooperation" of the school authorities in promoting religious education (333 U. S. at page 209), can be found in the provisions of Education Law, Section 3210(1-b) or the rules of the Commissioner of Education promulgated thereunder. The "radical" distinction (Op. of Court of Appeals, 303 N. Y. at p. 168; R. 168) of the New York program rests in the "radical" difference between the base of the Champaign plan and the base of the New York statute and the Commissioner's rules:—In Cham-

paing, sectarian religious classes were conducted in the regular classrooms of public school buildings by sectarian religious ecclesiastics. In New York, the statute and rules permit children to be *absent from school* for religious education "to be had outside the school building and grounds."

II

As to Appellee Commissioner of Education, there is certainly no issue of fact to be tried before the constitutionality of the State statute and Commissioner's rules can be determined.

We anticipate that appellants will argue that though the New York statute and rules be valid, this Court should not affirm the holding of the Court of Appeals, but should send the case back for trial. Appellants will probably contend, as they did in the State courts, that they are prepared to show operation of the program in New York City in a manner that is constitutionally objectionable. The answer is that if that be so, such operation constitutes a violation of the statute and rules; it does not condemn the statute and rules.

In their brief in the Court of Appeals appellants declared that it is "true" that the statute and rules could be unimpeachable constitutionally as written, and yet the operation be "invalid."

While they would like to draw the inference, as they tried in the State courts, that any abuse, if it appears, is inherent in the excusable absence statute, it is altogether clear that such an inference does not only not follow but is forbidden by every word and injunction of the statute and rules.

There are, as we have stated at the outset of this brief, more than 3000 school districts in New York State, and what one or even several school teachers may do in one of those 3000 districts, in defiance of the language and plain spirit and intent of the State statute and State rules, cannot make such constitutionally valid statute and rules invalid.

The State courts held, as to this contention by appellants, first, that the allegations which appellants claim to be of facts were largely "conclusory in character", and improperly pleaded (Op. 303 N. Y. at p. 174; R. 122). In response to appellants' claim of the relevancy of such allegations to the constitutional question, the Court of Appeals said citing decisions of this Court (303 N. Y. at pp. 174-5; R. 122-123):

"Moreover, many of the conclusory allegations suggest merely a disobedience of the rules and regulations. Such disobedience, while it might warrant the initiation of disciplinary proceedings against any of the offending teachers or principals, would in nowise warrant the relief prayed for, namely, a total discontinuance of the released time program and a rescission of all regulations established by the authorities. It is, of course, possible that a statute and regulations constitutional on their face may be administered in an unconstitutional way (*Snowden v. Hughes*, 321 U. S. 1; *Yick Wo v. Hopkins*, 118 U. S. 356), but in order to invoke this principle it must appear that there is 'an element of intentional or purposeful discrimination' by the enforcement authorities (*Snowden v. Hughes*, *supra*, p. 8). Here there is no allegation in the petition to that effect, and, indeed, even in appellants' brief and in the briefs *amici* supporting their position, 'The offer of proof was not an offer to show a pattern of discrimination consciously practiced' (*People v. Friedman*, *supra*, p. 81). Under the circumstances, whether the released time program is constitutional is

solely a question of law, and the case has been so treated by Special Term as well as by the Appellate Division majority and dissenters."

As the Court of Appeals pointed out, if the statute and rules ~~are~~ valid, as we think we have demonstrated them to be, any infraction of them, while perhaps calling for disciplinary action, would be without relevancy on the question of their validity.

Conclusion

To decide in appellants' favor, it must be held that the Constitution of the United States requires this Court to tell the State Legislature, as well as the schools, that the schools may not recognize the parent's request for the excuse of a child from school when the reason for the request is that the parent desires the child to attend religious classes outside the school, although they must honor such a request when it is to permit the child to go to the dentist or for music lessons during school time.

Such a decision and command would be indeed denial of the freedom of religion guaranteed by the Constitution. The guarantee is the freedom of the adult to enjoyment of religious profession and worship in his home or in his church, and to give religious education to his children in his home or his church.

Whether other people approve of a parent's judgment in asking that his children be excused once weekly from school to receive such religious education outside the school has no bearing upon the constitutionality of the law. The decision by the courts is to be made by measuring the law against the First Amendment, in its "dual aspects," what it prohibits—and what it protects.

We have shown in this brief that the law here and the Commissioner's rules do not demand nor do they permit anything which the Constitution prohibits.

On the contrary, to deny to parents their request that children be excused to attend religious education outside the school, while the school permits excuses for a variety of other activities (which could also be taken care of after school hours), would be to act "so as to handicap religions" and "to be their adversary." This the Constitution does not require the State to do or to be (*Everson v. Board of Education, supra*, 330 U. S. at p. 18).

The order and judgment of the Court of Appeals of New York should be affirmed.

January 20, 1952.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General of the State
of New York,
Attorney for Appellee,
Commissioner of Education of the
State of New York.

WENDELL P. BROWN,
Solicitor General,

RUTH KESSLER TOCH,

JOHN P. POWERS,

Assistant Attorneys General,
Of Counsel.

APPENDIX

From *Manual For Register Keeping*, University of the State of New York. Pages 9-13.

(Directions to teachers on keeping attendance records of pupils; appearing also in more summarized form on the inside cover and in forepart of the Register of Attendance supplied by the University of the State of New York, the State Education Department, in which each teacher must keep the attendance record of every pupil.)

METHODS OF ACCOUNTING

Absence

A. M.
P. M.
A. M. & P. M.



Tardiness (less than 30 minutes)

A. M.
P. M.
A. M. & P. M.



Tardiness (over 30 minutes)

Figure 1 shows loss up to
one hour



Figure 2 shows loss over
one hour



SYMBOLS FOR ILLEGAL ABSENCE

Unlawful detention O Truancy —

Truancy. A child sent to school, whose parents expect him to be in school, who does not attend for other than lawful reasons is a truant.

Unlawful detention. When a pupil is absent from school with the knowledge and consent, stated or implied, of his parent for other than legal reasons, it is a case of unlawful detention. Such excuses as the following come under this head: "visiting," "away," "went hunting," "vacation," "went to city," "shopping," "work," "needed at home," "helping at home," "caring for baby," "digging potatoes," "picking apples," "garden work," "no shoes," "no rubbers," "no clothes," "overslept," etc.

Excused Absence for Part of a Session

The figure 1 indicates absence up to one hour and the figure 2 up to two hours.

- A. M. Beginning of session
- A. M. End of session
- P. M. Beginning of session
- P. M. End of session

1
2
1
2

Use proper symbol to show cause of absence for part of a session and proper figure to indicate length of absence.

SYMBOLS FOR LEGAL ABSENCES

Sickness ¹	S	Required to be in court (may be used to indicate absence due to	
Sickness or death in family	F	driver test or interview before draft board)	Co
Impassable roads or weather, making travel unsafe	R	Music lesson	M
Religious observance ..	C	Attendance at organized clinics	Cl
Quarantine	Q	School supervised curricular projects ²	Ed
Remedial health treatment	H	Cooperative work program	W

¹ Schools may use code numbers to indicate sickness. These are shown on Form O, Analysis of "Absence Known to Be Due to Illness." Copies may be obtained from the superintendent of schools or the Bureau of Guidance, State Education Department. When code numbers are used the symbol "S" may be omitted in the register for that day. This system of recording is optional and should be used only at the direction of the superintendent of schools.

² The instruction of pupils on supervised curricular projects [e. g. trips to museums] away from their regularly assigned places in the school should be indicated in the register as absence from the school and explained by the use of the symbol "Ed." This symbol should be used when a part of or the whole school day is involved.

Unlawful detention

Tardy A. M.

Tardy P. M.

Absent A. M.

Absent A. M. & P. M.



Truancy

Tardy A. M.

Tardy P. M.

Absent P. M.

Absent A. M. & P. M.



USE OF SYMBOLS (EXAMPLES)

Absence

A. M. Sickness

A. M. and P. M. Sickness

A. M. Attendance at organized clinic

P. M. Required to be in court

A. M. and P. M. Religious observance

A. M. and P. M. Quarantine

A. M. and P. M. Supervised educational project ..

A. M. and P. M. Impassable roads or weather ...

Last hour in A. M. Sickness

First hour in A. M. Remedial health treatment ...

Last two hours in P. M. Illness in family



A. M. and up to one hour in P. M. Supervised educational project

Remedial health treatment
* note time in margin 9:30—10:30 in A. M.

Last hour in P. M. Supervised educational project

Last hour in P. M. Religious instruction

Last hour in A. M. Music

Last hour in P. M. Cooperative work program

Last hour in P. M. Unlawful detention

Truancy—skipped period and left building
* enter time in margin 2:00—2:45 P. M.

Tardiness

Under 30 minutes Church attendance

Over 30 minutes but up to one hour Sickness in family

Over one hour Truancy

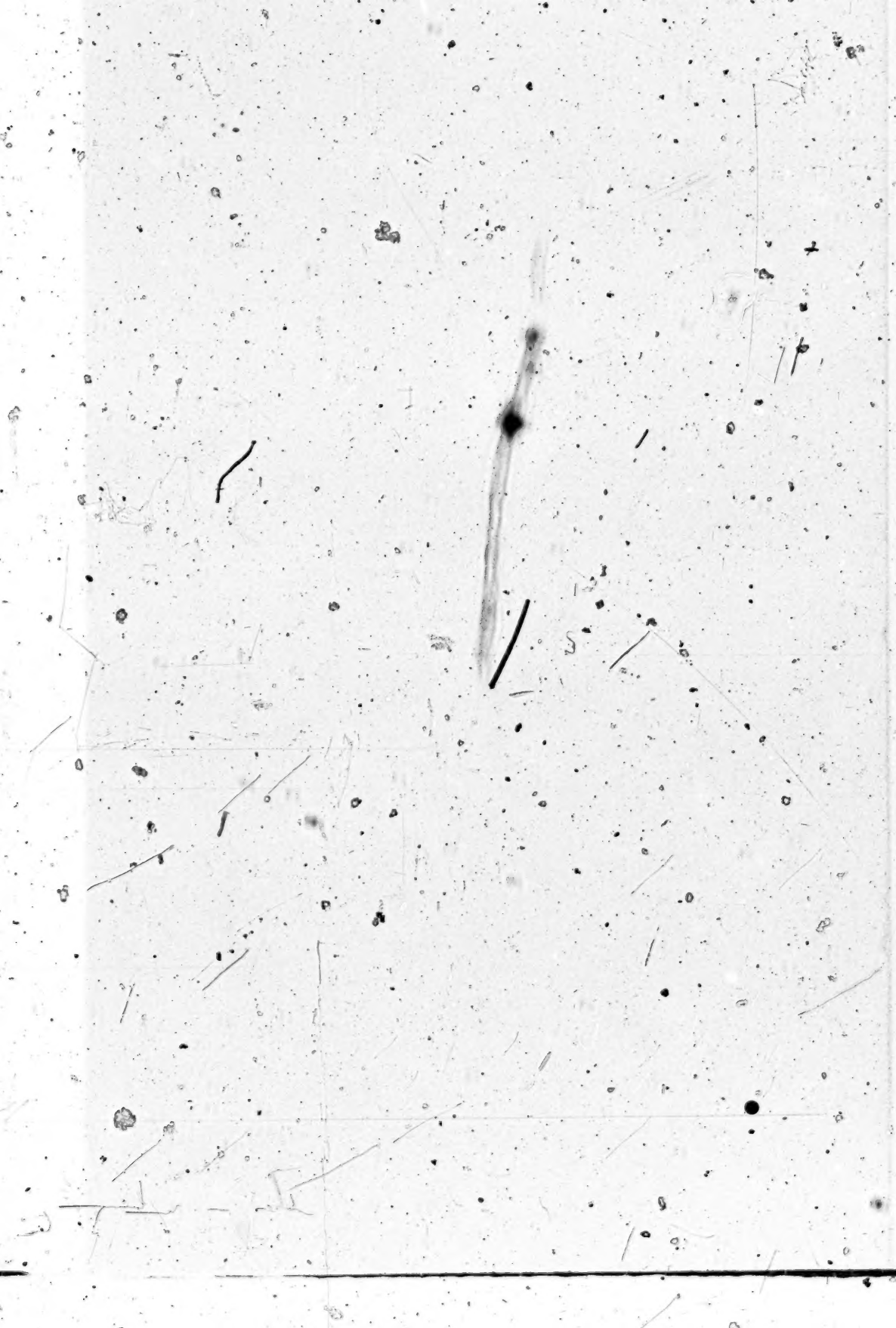
Under 30 minutes Unlawful detention

* NOTE: This is the direction for recording the absence for attendance at religious instruction pursuant to the statute and Commissioner's rules attached in this proceeding.

EA
H*

EA
F
M
W
O
-*

C
F ₁
-2
O



LIBRARY
Supreme Court of the United States

October Term, 1951

No. 431

U. S. Supreme Court, U. S.
FILED

JAN 29 1952

CHARLES ELMORE CROPLEY
CLERK

TESSIM ZORACH and ESTA GLUCK,

Appellants,

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSE, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE and JAMES MARSHALL, constituting The Board of Education of The City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

and

THE GREATER NEW YORK COORDINATING COMMITTEE
ON RELEASED TIME OF JEWS, PROTESTANTS AND
ROMAN CATHOLICS,

Appellees.

Appeal from the Court of Appeals of the State of New York

**BRIEF FOR APPELLEE THE GREATER NEW
YORK COORDINATING COMMITTEE ON
RELEASED TIME OF JEWS, PROTESTANTS
AND ROMAN CATHOLICS**

CHARLES H. TUTTLE,
*Attorney for The Greater New York
Coordinating Committee on Released
Time of Jews, Protestants and
Roman Catholics, Appellee.*

CHARLES H. TUTTLE
PORTER R. CHANDLER
LOUIS M. LOEB
Of Counsel

INDEX

	PAGE
The Basis of This Appeal	1
The Decisions Below	2
Statement of the Case	3
The Position of this Committee	3
The Nature of the Proceeding	4
The Sole Issue	5
What the Petition Does Not Ask	6
The Statutes Involved	7
Governor Lehman's Approving Memorandum	10
The Regulations Adopted by the State Commissioner of Education	11
The Regulations of the Board of Education of the City of New York	12
This is the Fourth Assault	13
The Gravity of the Issue	16
Summary of Argument	19

POINT I. The New York Statute does not violate the
First Amendment.

On the contrary, it merely recognizes and
implements the constitutional rights and re-
sponsibilities of parents, and the liberty of con-
science which the First Amendment guarantees.

	PAGE
A. The underlying bases of the Statute	20
B. Supporting decisions in this and other Federal Courts	25
C. The "natural rights" of parents. Their "unalienable rights"	27
D. Decisions upholding the rights of parents in matters of public education	33
E. A dilemma confronting Appellants. "Religious observance and education"	38
F. The New York Education Law negatives the predicates of the Appellants' arguments	41
POINT II. The New York Statute authorizing released time is designed to give reasonable protection to liberty of conscience and freedom of religious profession on the part of parents. No constitutional provision erects a gateless "wall of separation" between the State and parents, or between parents and their children, in the matter of public education	46
POINT III. The New York statute and regulations present a situation altogether different from that of the McCollum case	52
POINT IV. The Petition presents no triable issue of fact	62
Summary and Conclusion	73
Appendix A. Opinion of Mr. Justice DiGiovanna, denying petitioners' motion for reargument	75
Appendix B. Extracts from New York Education Law	77

CITATIONS

Cases

	PAGE
Bartels v. Iowa, 262 U. S. 404	25
Beard v. Alexandria, 341 U. S. 622	22, 23
Butcher's Union, etc., Co. v. Crescent City, etc., Co., 111 U. S. 746	21, 29
Commonwealth v. Armstrong, 1 Penna. Law Journal Reports 392	32
Denton v. James, 107 Kans. 729; 193 Pac. 307	31
Eyerson v. Board of Education, 330 U. S. 1	26
Gordon v. Board of Education of the City of Los Angeles, 78 Cal. App. 2d 464; 178 P. 2d 488; re- view denied 78 Cal. App. 2d 464, 481	15
Gulf, Colorado and Santa Fe Railway v. Ellis, 165 U. S. 150	21, 28
Hardwick v. Board of School Trustees, 54 Cal. App. 696; 205 Pac. 49; aff'd 54 Cal. App. 714; 205 Pac. 56	34
Holy Trinity Church v. United States, 143 U. S. 457	25
Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203	18, 52, 57, 58, 59, 60, 61, 62, 65, 67, 70, 73
Matter of Livingston, 151 App. Div. 1	31
McCollum v. Board of Education	18, 52 et seq.
Meyer v. Nebraska, 262 U. S. 390	24, 25, 30, 31
Morrow v. Wood, 35 Wisc. 59; 17 Am. Rep'ts. 471	36

People v. Barber, 289 N. Y. 378	27
People ex rel. Lewis v. Graves, 127 Misc. 135, aff'd 219 App. Div. 233; aff'd 245 N. Y. 195; rehear- ing denied 245 N. Y. 620	3, 10, 13, 43, 56
People ex rel. Lewis v. Spaulding, 193 Misc. 66, ap- peal dismissed 299 N. Y. 564	3, 58, 61, 67, 68
Pierce v. Society of Sisters, 268 U. S. 510	4, 22, 24, 25, 28, 31, 44
People v. Turner, 277 App. Div. 317	8, 42
Prince v. Massachusetts, 321 U. S. 158	26
Rulison v. Post, 79 Ill. 567	37
School Board v. Thompson, 24 Okla. 1; 103 Pac. 578	34
Selective Draft Law Cases	73
State v. Ferguson, 95 Nebraska 63; 144 N. W. 1039	36
State ex rel. Kelley v. Ferguson, 95 Neb. 63; 144 N. W. 1039	37
State v. School District, 31 Nebraska 552; 48 N. W. 393	35
Stuart, In re, 114 F. 2d 825	26
Trustees v. People, 87 Ill. 303; 29 Am. Rep's	35, 36
United States v. Cruikshank, 92 U. S. 542	27
West Virginia State Board of Education v. Barnette, 319 U. S. 625	26, 51
Zucht v. King, 260 U. S. 174	63

Index

Statutes and Constitutional Provisions

	PAGE
Constitution of the United States:	
First Amendment	5, 51
Fourteenth Amendment	5, 51
Constitution of the State of New York:	
Art. I, Sec. 3	5, 21
Art. XIII, Sec. 1	21
Preamble	20
United States Code:	
28, Sec. 1257(2)	1, 62
26, Sec. 101(6) and (18)	72
49, Sec. 22	72
50, App., Sec. 456-g	72
New York Civil Practice Act:	
Sec. 1298	3
Sec. 1296(1)	2, 4
Art. 78	4, 68
New York Education Law:	
Sec. 3210	2, 7, 42, 79
Sec. 3210-1(b)	7, 62, 63
Sec. 3204	8, 42, 43, 77
Sec. 3204(2)	43
Sec. 3204(3)	43
Sec. 3205	79
Sec. 3211	80
New York Judiciary Law:	
Sec. 546(1)	73
New York Penal Law:	
Sec. 925(b)	72
New York Tax Law:	
Sec. 4(6) and (10)	73

Other Authorities

PAGE

Annual Report of Carnegie Foundation	47
Declaration of Human Rights, Art. 26 (United Nations)	49
Declaration of Independence	21, 22, 28
Deuteronomy, ch. 12 v. 28	40
International Covenant on Human Rights (United Nations)	49
Journal of the New York Legislature	7
Stokes, Church and State in the United States	60

Supreme Court of the United States

October Term, 1951

No. 431

TESSIM ZORACH and ESTA GLUCK,

Appellants,

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE and JAMES MARSHALL, constituting The Board of Education of The City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

and

THE GREATER NEW YORK COORDINATING COMMITTEE
ON RELEASED TIME OF JEWS, PROTESTANTS AND
ROMAN CATHOLICS,

Appellees.

BRIEF FOR APPELLEE THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS

The Basis of this Appeal

The petitioners have appealed to this Court under 28 U. S. Code §1257(2), permitting an appeal in a case "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity".

The Decisions Below

The appellant-petitioners commenced this proceeding in the New York Supreme Court, Kings County, by petition under Section 1296(1) of the New York Civil Practice Act, which is the statutory equivalent of a proceeding for a mandamus.

They asked for a final order imposing upon the respondents, the State Commissioner of Education and the New York City Board of Education, the "non-discretionary duties" of annulling forthwith and absolutely "the released time program," which was established in 1940 pursuant to Section 3210 of the New York Education Law and the regulations promulgated thereunder, and which permits children, whose parents so request, to be excused from public school for one hour a week for instruction, off the school premises, at religious centers and by religious teachers designated by the parents (R. 22). Petitioners claimed that both the statute and the regulations thereunder were unconstitutional *in toto* (R. 23).

In the Supreme Court, Kings County, Mr. Justice DiGiovanna entered a final order (R. 6-10) which dismissed the petition on the merits as a matter of law.

His opinion is found at R. 81-98, and is reported in 198 Misc. 631 and 99 N. Y. Supp. (2d) 339. He denied a motion for reargument with an opinion appearing in the New York Law Journal, Aug. 23, 1950, p. 299, col. 5, and attached as Appendix A to this Brief.

His order was affirmed by the Appellate Division (R. 107-111; 278 App. Div. 573), and by the Court of Appeals (R. 114, 142³; 303 N. Y. 161).

STATEMENT OF THE CASE

The Position of this Committee

Pursuant to Section 1298 of the New York Civil Practice Act, this Committee, thrice mentioned in the petition (R. 18-20), was permitted to intervene by an unappealed order dated June 26, 1949, which made the Committee a party respondent, with leave "to file an answer" and "to be heard on all subsequent proceedings that may be had." The accompanying opinion is reported in 195 Misc. (N. Y.) 53.

The Committee is composed of an equal number of Jews, Protestants and Roman Catholics, *all laymen*. It was organized in 1923 for the purpose, among others, of furthering the "New York Plan of Released Time."

Accordingly the Committee participated in the two previous litigations in which the constitutionality of the New York Plan of Released Time was sustained by every judge in every court which considered it.

People ex rel. Lewis v. Graves, 127 Misc. 135, aff'd 219 App. Div. 233; aff'd 245 N. Y. 195, rehearing denied 245 N. Y. 620 (1926-7);

People ex rel. Lewis v. Spaulding, 193 Misc. 66, appeal dismissed 299 N. Y. 564 (1948-9).

The Committee now speaks in the name and interest of the hundreds of thousands of religious parents throughout the State of New York who stand upon their own constitutional rights under the First Amendment, and who strongly resent the attempts of these two petitioners to use the courts to force upon all parents—and upon the State of New York—the petitioners' own ideas as to how other people's children, enrolled in the public schools, must be exclusively educated.

They believe that the very essence of constitutional liberty in this country was unanimously expressed by the Supreme Court of the United States in *Pierce v. Society of Sisters*, 268 U. S. 510, in the following historic and profoundly American statement, the truth and wisdom of which have been increasingly solemnized by the tragic human history of the years since its utterance (pp. 534-5):

"Under the doctrine of *Meyer v. Nebraska*, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with *the liberty of parents and guardians to direct the upbringing and education of children under their control*. . . . The fundamental theory of liberty upon which all governments in this Union repose *excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only*. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (Italics ours.)

We submit that the time is ripe for reaffirmance of the basic principles thus enunciated.

The Nature of the Proceeding

The proceeding below was brought under Article 78, Section 1296(1) of the New York Civil Practice Act, which is the statutory equivalent of a proceeding for a writ of mandamus. That Section reads:

"In a proceeding under this article, the questions involving the merits to be determined upon the hearing are the following only:

1. Whether the respondent failed to perform a duty specifically enjoined upon him by law."

The Sole Issue

The petition bases its case and its prayer for an order of mandamus exclusively upon the subdivision just quoted (R. 22-3).

The petition's target is Section 3210 of the New York Education Law which deals with attendance of children at schools, both public and private, and which lists various recognized reasons for permitted absence from both, including "*absence for religious observance and instruction*" (R. 15).

After citing (but not quoting) Section 3210 (R. 15), the petition sets forth the regulations established, pursuant to the statutory mandate, by the State Commissioner of Education (R. 15-16) and by the New York City Board of Education (R. 16-18). The petition then asserts as its issue of law and ground for a final order (R. 22):

"TWENTY-THIRD: Rescissions of the aforesaid regulations and discontinuance of the released time program *are non-discretionary duties imposed upon respondents by the Constitution of the United States and of the State of New York as aforesaid.*" (Italics ours.)

The constitutional provisions thus cited but not quoted are stated to be the First and Fourteenth Amendments to the Federal Constitution, and Section 3 of Article I of the New York Constitution (R. 21). This Section 3 of the New York Constitution guarantees "liberty of conscience" and "the free exercise and enjoyment of religious profession and worship, without discrimination or preference".

The same single issue of law, to wit, "*non-discretionary*" duty, is again tendered in petitioners' prayer for a final order (R. 23):

"Wherefore, your petitioners respectfully pray for an order directed against respondents and commanding respondent Board of Education *to discontinue the released time program as described in the petition and abrogate and rescind all regulations* established by it authorizing such released time program; and further commanding respondent Commissioner of Education to rescind and abrogate the regulations respecting released time established by the Commissioner of Education and to issue an order to respondent Board of Education directing said Board to rescind and abrogate the regulations respecting released time established by it as described in the petition, and to discontinue the released time program as aforesaid; and further granting petitioners such other and further relief as may be just and proper in the premises." (Italics ours.)

What the Petition Does Not Ask

1. The petition contains no allegations whatever that the regulations are not authorized by the Statute. *The sole charge is that the Federal and State constitutions forbid both the Statute and the regulations.*

2. The petition *does not ask* for the abolition or modification of any particular regulation or regulations. It asks for the abolition of all of them *in toto*.

3. The petition *does not ask* for any restraint or correction of any violation of the regulations or of the Statute challenged. It seeks not enforcement but permanent nullification *in toto* (R. 116).

4. The petition *does not ask* any better fulfillment of the Statute authorizing Released Time. On the contrary, it asks permanent nullification of both the Statute and Released Time *in toto*.

5. The petition *does not ask* any remedy for the particular benefit of these petitioners, and does not allege any particular injury to them. Indeed, Paragraph Twenty-second of the petition (R. 22) alleges that petitioners' own children,—as was their right—never took part in this voluntary Released Time program.

The Statutes Involved.

The petition (pars. "Sixth", R. 15; and "Twentieth", R. 21-2) directs itself against Section 3210 of the Education Law of New York, and particularly against Subsection 1(b):

The full texts of Section 3210 and of certain allied Sections are set forth in Appendix B attached to this Brief.

Section 3210-1(b), which was added in 1940 (L. 1940, Ch. 305), provides:

"Absence for religious observance and education shall be permitted under rules that the commissioner [the State Commissioner of Education] shall establish."

The Journal of the Legislature shows that this amendment passed the Assembly by a vote of 132 to 7, and the Senate by a vote of 46 to 1 (R. 114).

The petition seeks to use the First Amendment in such wise as to expunge this enactment and to replace it with the reverse, to-wit, that the Education Law of New York must be deemed to have written into it by the First Amendment the following "*non-discretionary*" prohibition (R. 22):

"Absence for religious education shall NOT be permitted."

8

The State which creates the Education Law may sanction *bona fide* absences. Appellants do not challenge the State's present sanction of absence, at parental request, for "instruction in music" or dancing, or because of "sickness", "quarantine", or "impassable roads", or attendance in court (*cf.* R. 54 and 118). But they absolutely deny that the State has any power at all to sanction any absence at parental request for instruction in the parents' religious faith.

Does the Constitution of the United States require such an absolute denial and prohibition?

For many decades the Education Law of New York has provided, with slight textual changes due to arrangement (Section 3204):

"1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction." (Italics ours.)

Citing this Section 3204 the Appellate Division, Fourth Department, recently delivered this unanimous decision concerning the proper construction and requirements of the State's Education Law (*People v. Turner*, 277 App. Div. 317, 319 (July 1950):

"There is no provision in the Education Law which prohibits instruction of children at home, nor is there any provision requiring certification of a parent by the Commissioner of Education before she may teach her children at home.

The State is interested in the education of a child for its own protection and the public good, for the purpose of developing good citizenship, but the child is not the mere creature of the State; those who nurture him and direct his destiny have the right,

coupled with the high duty, to recognize and prepare him for additional obligations.' (*Pierce v. Society of Sisters*, 268 U. S. 510, 535.) . . .

The object of a compulsory education law is to see that children are not left in ignorance, that from some source they will receive instruction that will fit them for their place in society. *Provided the instruction given is adequate and the sole purpose of non-attendance at school is not to evade the statute*, instruction given to a child at home by its parent, who is competent to teach, should satisfy the requirements of the compulsory education law. (See *Wright v. State*, 21 Okla. Cr. 430; *People v. Levisen*, 404 Ill. 574.)

In the *Levisen* case (*supra*) the statute required attendance at a public or private or parochial school, and the court held that competent home instruction came within the purview of attendance at a private school. The New York statute is obviously broader. (Italics ours.)

The Court of Appeals in the case at bar took a similar view of the State's Education Law and its requirements (R. 118-9, 121).

Furthermore, as accurately said by the Court of Appeals (R. 121):

"The New York City Board of Education provides more days for secular instruction than required by law (Education Law, §3204, subd. 4). The Education Law does not fix the number of hours that constitute a school day."

Governor Lehman's Approving Memorandum

The well-nigh unanimous action of the Legislature in enacting the Statute now attacked, was approved in 1940 by Governor Lehman, "whose devotion to constitutional liberties needs no encomium" (concurring opinion of Judge Desmond, R. 125). In approving the Statute, Governor Lehman filed this memorandum (R. 27-29):

"Under this bill the State Commissioner of Education shall establish rules under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education.

For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: "Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support."[*].

However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agency of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules.

"A few people have given voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system." (Italics ours.)

* *People ex rel. Lewis v. Graves*, 245 N. Y. 195, 198.

The Regulations Adopted by the State Commissioner of Education

Pursuant to the 1940 statutory mandate, the State Commissioner of Education promulgated, on July 4, 1940, the following Regulations which are set forth in the petition and are still in force (R. 15-16):

1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil.
2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.
3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.
4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.
5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.
6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

The Regulations of the Board of Education of the City of New York

On November 13, 1940, the Board of Education of the City of New York, pursuant to the same 1940 statutory mandate, issued the following Regulations which are set forth in the petition (R. 16-18):

1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.
2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.
3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.
4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week, except that in classes on a departmental schedule release will be limited to the last period of the program.

5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.
6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

These Regulations have been continued without change except that Regulation No. 4, was amended by the Board of Education on September 24, 1941, to read as follows (R. 18):

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

This is the Fourth Assault

This is the fourth attempt during the last twenty-five years to induce the courts to knock out, as unconstitutional under the Federal and State Constitutions, the "New York Plan For Released Time;" now representing the voluntary desire of the parents of over 200,000 children in the State of New York and of over 2,000,000 children throughout the United States (R. 121).

(1) The first attempt was in 1926-7. It was made against a like Plan adopted by the School Board of the City of White Plains (R. 118). It failed without benediction from a single one of the thirteen judges who heard the case (*People ex rel. Lewis v. Graves*, 127 Misc. 135; aff'd 219 App. Div. 233; aff'd 245 N. Y. 195, rehearing

denied, 245 N. Y. 620). The Judges of the New York Court of Appeals who so decided were: Cardozo, Ch.J., Pound, Crane, Andrews, Lehman, Kellogg and O'Brien, JJ.

As shown by the Record on Appeal therein, the petition of Lewis, verified January 15, 1926, expressly charged (Par. VI, fol. 28) (R. 119):

"The functions of the public schools of White Plains are thus delegated to the churches for 45 minutes each week in violation of the constitutional guarantees of the New York State and the United States Constitutions respecting religious liberty and the separation of church and state." (Italics ours.)

In paragraph VIII of his same petition Lewis alleged that the White Plains Plan violated the (fol. 30)

"constitutional guarantees, State and Federal, respecting religious liberty and the separation of church and state as aforesaid." (Italics ours.)

In his prayer for relief Lewis asked for a mandamus imposing the non-discretionary duty upon the State Commissioner of Education and the Superintendent of the Public Schools of White Plains to annul the whole plan as (fol. 39)

"in violation of the laws and constitutions of this State and of the United States respecting education and the separation of church and state." (Italics ours.)

Nevertheless, and notwithstanding these claims under the United States Constitution, reasserted by the petitioners in the present proceeding, Lewis failed to carry his case to the United States Supreme Court.

We respectfully urge upon this Court close consideration of the learned opinions written by all three counts in that litigation.

(2) The second attempt was in 1947. It was made outside of New York, but against a like Statute and Plan. *Gordon v. Board of Education of the City of Los Angeles*, 78 Cal. App. 2d 464; 178 P. 2d 488; review denied by California Supreme Court, 78 Cal. App. 2d 464, 481. Again not a single judge dissented.

(3) The third attempt was again made in New York, and was again spearheaded by Joseph Lewis. It was begun in 1948 after the decision of this Court in the *McCollum* case. The attempt failed before Mr. Justice Elsworth, whose opinion dismissed the petition, the basic claims in which are reproduced in the present petition (193 Misc. 66).

The present appellants were aware of the pendency of that case when they began the present proceeding (R. 72).

The then petitioner, Joseph Lewis, again invoked the Constitution of the United States, and appealed to the Court of Appeals on the same constitutional grounds as are now urged. When the case was called for argument on April 11, 1949, his counsel, over our objection, withdrew his appeal, which was accordingly dismissed (299 N. Y. 564).

(4) The present is the fourth attempt. It seeks to destroy a program which has been a settled part of the educational system of New York for twenty-five years, has been repeatedly upheld by all the courts of that State, has been widely followed elsewhere, and has afforded at least a modicum of liberty of conscience to myriads of parents and children.

The Gravity of the Issue

The case at bar presents one of the most crucial issues of civil and religious liberty ever submitted to this Court.

In March, 1948, the National Education Association and the American Association of School Administrators approved the Report of their Joint Educational Policies Commission, entitled "Education for *All* American Children." That report advocated "the lengthening of the school day," "the year round school plan," and that "the schools are almost never closed." It emphasized the "home-work" projections of the secular curriculum.

We cite this Report not to take issue with it, but merely to show that we have not yet reached the end of the ever lengthening and widening road which the State as the educator of all children has been travelling from its simple and brief beginning in the three R's toward almost total absorption of the so-called "business hours" of children,—the sum total of the time available for their mental and physical capacity for education.

We cite this Report also for its implicit portrayal of the truth that whoever can get hold of the control of education can by lengthening and expanding the secular programs absorb for their purposes *all* the "business hours" of the child, as they may choose to fix such "hours".

In the midst of this continuing expansion of public secular education, from which all religious instruction is said to be constitutionally barred, millions of parents have come to feel, as they have a constitutional right to feel, that this system in and of itself is indoctrination in a secular philosophy of life, and tends to inculcation, however unintentional, of materialistic behavior tendencies,

which such parents feel that they should not be forced to attempt to counteract and undo in order that their children may have such spiritual and religious outlooks and faith as the parents consider essential for their children's welfare and destiny here and hereafter.

Is the State really compelled by the Constitution to say to all religiously-minded parents:

"If you do not want your child, who is in the public school, to have a 100% education in what you have the constitutional right to regard as sheer secularism, you must nevertheless go on paying your school tax and yet send him to a private or parochial school,—if you are lucky enough to find an acceptable one and are rich enough to afford it. But if you once enroll him with us—as most of you have to do—the Constitution says that all his 'business hours' must belong exclusively to us for that kind of secular education and for as many hours in and out of the school buildings as we shall fix. We would like to respect your wishes and your liberty of conscience; and let you have elsewhere a small part of those 'business hours' to teach your child the faith of his fathers, but the Constitution says that we cannot and the courts say that we must not."

Is that the free exercise of religion guaranteed by the First Amendment?

Is that the sole alternative which the Constitution forces the states to force upon parents who have, and wish to exercise, a constitutional right to view, with deep concern for their children the consequences of such a vast and exclusively secular system of education?

Does the Constitution throw upon such parents the burden and task of attempting, outside the "business hours" available physically and mentally for the education of their children, to counteract and undo the behavior

tendencies and the trends of character, action and belief which they have the right to fear and to regard as the consequences of such a system?

Must free people, presumed to be guaranteed by their Constitution the free exercise of inalienable rights, accept, as a corollary of the same Constitution, that the State is so far in control of education that whoever can lay their hands on the levers of such control, can through the public schools get control of shaping the minds, values and behavior trends of the successive ranks of the people's children?

The basic and grave issue here is as simple and bare as its following formulation in the opinion of the Court of Appeals (R. 121):

"Because the public school must be kept separate and apart from the church, pupils may not constitutionally receive religious instruction therein. All that New York parents ask then is that their children may be excused one hour a week for that purpose."

This far-reaching constitutional issue was neither presented nor decided in the *McCullum* case (333 U. S. 203). (See Point III, p. 52, *post*.) It is presented for decision now.

It was met and decided by the New York Court of Appeals in these words (R. 120):

"While extreme care must, of course, be exercised to protect the constitutional rights of these appellants, it must also be remembered that the First Amendment not only forbids laws 'respecting an establishment of religion' but also laws 'prohibiting the free exercise thereof'. We must not destroy one in an effort to preserve the other. We cannot, therefore, be unmindful of the constitutional rights of those many parents in our State (we are told that some 200,000 children

are enrolled in the released time programs in this jurisdiction, and ten times as many throughout the nation) who participate in and subscribe to such programs."

Or, as Judge Desmond put it in his concurring opinion (R. 126):

"The true and real principle that calls for assertion here is that of the right of parents to control the education of their children, so long as they provide them with the State-mandated minimum of secular learning, and the right of parents to raise and instruct their children in any religion chosen by the parents."

There is nothing in the United States Constitution which commands that religious instruction shall be given only on the Sabbath or in such marginal moments as can be begged or coaxed after the child's "business hours". The Church is not a poor relative in the house of the State.

Summary of Argument

I. The New York Statute does not violate the First Amendment. On the contrary, it merely recognizes and implements the constitutional rights and responsibilities of parents, and the liberty of conscience which the First Amendment guarantees. (*Infra*, pp. 20-45.)

II. The New York Statute authorizing Released Time is designed to give reasonable protection to liberty of conscience and freedom of religious profession on the part of parents.

No constitutional provision erects a gateless "wall of separation" between the State and parents, or between parents and their children, in the matter of public education. (*Infra*, pp. 46-52.)

III. The New York Statute and regulations present a situation altogether different from that of the *McCullum* case. (*Infra*, pp. 52-62.)

IV. The petition presents no triable issue of fact. (*Infra*, pp. 62-72.)

POINT I

The New York Statute does not violate the First Amendment.

On the contrary, it merely recognizes and implements the constitutional rights and responsibilities of parents, and the liberty of conscience which the First Amendment guarantees.

A. The underlying bases of the Statute

(1) In 1938 the citizens of New York adopted a Constitution with this Preamble:

"WE, THE PEOPLE of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION."

This Preamble, expressive of a religious tenet taught by the Old and New Testaments alike and thus given affirmance by the State, has appeared in every Constitution of New York State since 1821. As such it is part of an instrument of government supported and enforced

by public taxes and by salaried public officers, sworn to support the same (N. Y. Constitution, Art. XIII, Sec. 1).

Preambles expressing similar gratitude to Almighty God as the Author and Protector of our freedom and its blessings appear in the Constitutions of every state in the Union (except West Virginia) and have so appeared from the earliest times.

The Declaration of Independence had as its text the religious tenet that the "Creator" was the Author of these "unalienable rights" to the defense of which our forefathers, "with a firm reliance on the protection of Divine Providence", mutually pledged "our lives, our fortunes, and our sacred honor". The United States Constitution is, and was intended to be, an embodiment of the principles in that great Declaration. (*Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S. 150, 160; *Butcher's Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 756.)

Has the momentum of secularism become such that we have now reached a point where no Legislature in the Union, although created and thus dedicated by the State Constitution and endowed with full legislative power, may constitutionally recognize a right in parents to request the absence of their children from public school for one hour a week in order that they may learn to be "grateful to Almighty God for our Freedom" and to the "Creator" who has endowed them with their "unalienable rights"?

(2) The same Constitution of the State of New York solemnizes this Preamble by affirming (Art. I, sec. 3) "the liberty of conscience hereby secured", and by asserting that:

"The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind."

This provision was copied almost verbatim from the original New York Constitution of 1777, adopted amid the echoes of the Declaration of Independence.

Millions of parents throughout this country believe with deepest conviction that the momentum of secularism is a basic cause of the world's ills, and that it undermines the very cornerstone of our freedom as expressed in these constitutional Preambles and in the Declaration of Independence. Those millions of parents have a constitutional right so to believe, and to demand reasonable freedom and respect for that belief in and amid the education of their children.

Can other parents or other groups now use these same constitutional guaranties to impose upon everyone, including the State itself, their own theories as to the contents and implications of the education of other people's children? Can they force upon other parents the task of endeavoring to undo after the child's "business hours" the implications which those other parents fear?

Is there, to quote *Beard v. Alexandria*, 341 U. S. 622, 626, "an iron standard to smoothen their path by crushing the living rights of others"?

(3) The groups which now gather to destroy the Plan under which the people of New York, and of many other States, have been successfully living for some decades, are, we submit, deceiving themselves.

In the name of liberty, they are for striking down what this Court in *Pierce v. Society of Sisters* (268 U. S. 510, 534-5) truly said was a basic part of "the fundamental theory of liberty upon which all governments in this Union repose."

In the name of protecting religious freedom, they are pressing for judicial interpretations which can sanction a

state absolutism in the matter of education capable of undermining and destroying all religion at its very seat of life,—the mind of the child.

In the name of preventing divisiveness, they now present and create divisiveness in its most explosive and mischievous form,—marshalling groups against other groups for the purpose of compelling the latter to submit to the formers' views as to the educational impacts to be made on the minds of the latter's children.

(4) This is not a case where a local school board has attempted to curtail for any pupil the number of compulsory hours in school, or the number of compulsory subjects of instruction, or the place of compulsory attendance, as fixed by State law (R. 121).

Nor is this a case where a local school board has attempted to add a new excuse for absence to those recognized or permitted by State law.

This is a case where the Legislature itself has acted, and has by law declared the policy of the State as to permitted absences from compulsory attendance in the school building during school hours,—“religious observance and education”. The State itself, acting through the Legislature, has, in the words of the New York Court of Appeals, made *“this sincere and most scrupulous effort to find an accommodation between constitutional prohibitions and the right of parental control over children”* (R. 120).

As said in *Beard v. Alexandria*, 341 U. S. 622, concerning the application of the Constitution's provisions to legislative action (p. 623):

“The problem is legislative where there are reasonable bases for legislative action.”

The question therefore arises as to whether this legislative determination in the fashioning of the Education

Law of the State must be brought under review and veto by this Court in the name of the First Amendment. What would be the logical and natural consequences to our system of government and our conception of personal liberties if this Court attempted such a review and veto?

Would not this Court become a super Educational Authority to decide what excuses for absence may or may not be authorized by a State?

And how far would the principles underlying such a veto, and the implications thereof, reach beyond the educational field and invite efforts to bring this Court into censorship over the innumerable instances and authoritative declarations in the public life of this nation wherein since this nation's birth there have been and still are official profession of faith, trust and gratitude as regards Almighty God, and official recognition of the value and need of religion in the life of the people? (R. 131).

If the onrushing currents of secularism throughout the world *must* exclude the religious convictions of parents from any recognition at all amid public education, then the Constitution itself can become the instrument of regimentation and of sweeping religion and the Church into a backwater of life.

Such is the appalling lesson of all the systems of Brown, Black and Red Shirts throughout the last twenty years—not to go back further in the history of tyranny.

Such also is the dismaying lesson of what would have happened in Nebraska and Oregon if this Court had not intervened (*Meyer v. Nebraska*, 262 U. S. 390, and *Pierce v. Society of Sisters*, 268 U. S. 510).

B. Supporting decisions in this and other Federal Courts

In *Holy Trinity Church v. United States*, 143 U. S. 457 (1892), this Court unanimously said (p. 465):

"But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."

In *Meyer v. Nebraska*, 262 U. S. 390 (1923), this Court held (to quote the headnote):

"A state law forbidding, under penalty, the teaching in any private, denominational, parochial or public school, of any modern language, other than English, to any child who has not attained and successfully passed the eighth grade, invades the liberty guaranteed by the Fourteenth Amendment and exceeds the power of the State."

This Court further said (p. 401):

"That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected." (Italics ours.)

In *Bartels v. Iowa*, 262 U. S. 404 (1923) this Court reaffirmed this ruling.

In *Pierce v. Society of Sisters*, 268 U. S. 510 (1925) this Court unanimously held unconstitutional the Oregon Compulsory Education Act, which, with certain exemptions, required every parent or guardian of a child between the ages of eight and sixteen to send him to the public school in the district where he resided, for the

period during which the school was held in the current year. This Court made the historic declarations (pp. 534-5) which have already been quoted, p. 4, *supra*.

In *West Virginia State Board of Education v. Barnette*, 319 U. S. 625 (1943), this Court did not require the abolition of the ~~entire flag salute~~ program, but merely held unenforceable its compulsory features with respect to those (Jehovah's Witnesses) having conscientious objections to participation.

In *Prince v. Massachusetts*, 321 U. S. 158 (1944), this Court said (p. 166):

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (Italics ours.)

In *Everson v. Board of Education*, 330 U. S. 1 (1947), this Court upheld as constitutional a New Jersey statute authorizing District Boards of Education to make contracts for the transportation of children, at public expense, to parochial schools. Writing for the Court, Mr. Justice Black said that this enactment was within the "state's power to legislate for the public welfare" (p. 6), and that (pp. 16, 18):

"On the other hand, other language of the [First] Amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion"

In *In re Stuart*, 114 Fed. (2d) 825 (1940) the United States Court of Appeals for the District of Columbia said (p. 832):

"Under our constitutional system, the citizen has more than a revocable privilege to possess and to rear his children. Under our theory of government there is recognized as inherent in parents a right to maintain the custody and to direct the upbringing and education of their own offspring." (Italics ours.)

C. The "natural rights" of parents. Their "unalienable rights"

(1) These decisions represent the traditional American conception of "natural rights" which underlie and precede the Bill of Rights.

As said by this Court in *U. S. v. Cruikshank*, 92 U. S. 542, 553 (1875):

"The rights of life and personal liberty are *natural rights of man*. 'To secure these rights', says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.'" (Italics ours.)

In *People v. Barber*, 289 N. Y. 378 (1943), the Court of Appeals of New York said, *per* Chief Judge Lehman (p. 385):

"It (the Bill of Rights) is a guarantee of those rights which are essential to the preservation of the freedom of the individual—rights which are part of our democratic traditions and which no government may invade."

The present proceeding is, both directly and in its implications, an attack upon these basic natural and civil liberties thus repeatedly declared in repeated decisions by this Court.

In all these decisions religious believers are told that "the liberty of parents and guardians to direct the up-

bringing and education of children under their control" is a basic part of "the fundamental theory of liberty upon which all governments in this Union repose" (*Pierce v. Society of Sisters*, 268 U. S. 510, 534-5).

In all these decisions religious believers are told that the First Amendment "does not require the State to be their adversary"; that the public school may not use its educational authority in ways or with implications which "hamper" or are contrary to religious convictions of the parents or which require parents to undo what they fear therefrom; and that, in the name of public welfare, the State may relieve them of the cost of transporting their children to parochial schools of their choice.

But now come these appellants with different ideas. They seek to force the State to tell all parents that, however deep their fears may be as to a vast system of exclusively secular education, the State cannot show them therein the slightest measure of accommodation.

(2) *Stated nakedly, the issue in its ultimate reach is between State absolutism in public education, and the natural and constitutional rights of parents.*

Since this issue is fundamental, we had best get back to fundamentals in analyzing it.

Our best starting point is the Declaration of Independence. This Court has said (*Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U. S. 150, 160 [1897]):

"the latter [the Constitution] is but the body and the letter of which the former [the Declaration] is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."

The Declaration of Independence asserts as "self-evident truths" that:

"all men are endowed by their Creator with certain unalienable Rights";

and that

"to secure these Rights, Governments are instituted among Men".

The Founding Fathers in general, and their draftsman Thomas Jefferson in particular, knew exactly what they were doing and meant when they used those words.

In the first place, they intended to make it plain for all time that the natural and "unalienable rights" of the citizen come from the Creator and hence are beyond withdrawal by the State, and that they do not come from the State which can withdraw tomorrow what it grants today.

In the second place, they intended to make it plain for all time that the State exists to "secure" those rights, not to "grant" them.

These distinctions are not mere pieces of pious rhetoric or of speculative philosophy. They lie at the root of our whole constitutional system and are the issue which confronts and divides our tragic world today. They are the decisive factors in this case. See the statements of Mr. Justice Field in his concurring opinion in *Butcher's Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 756.

Once we admit that the State is the source of all rights, "unalienable rights" cease to be even an intellectual concept.

The citizen then becomes the mere creature of the State and of those in control of the State. No matter what governmental forms are preserved or receive lip-service, freedom collapses and police-enforced regimentation and conformity take its place.

(3) *The next question to consider is what are the "unalienable rights" referred to in the Declaration as the rights with which "all men are endowed by their Creator."*

For present purposes it is not necessary to catalogue them all. After the right to life, the most fundamental and "unalienable" right of all is the right to marry, establish a home and rear a family. A moment's consideration will demonstrate that if that right is denied, almost all other rights lose their meaning and existence.

Or, to put it a little differently, in the free society contemplated by the Declaration of Independence and safeguarded by the Constitutions of the United States and of all the States, *the family and not the State is the fundamental unit.* The State exists to protect the citizen and his family. The citizen and his family are neither the creatures nor the slaves of the State. Nor is the rearing and education of children a function which the State *grants or delegates* to the parents.

The right to marry, establish and maintain a home, and rear a family carries with it both the right and the duty to educate (in the full sense of that term) one's own children in accordance with the dictates of one's conscience and faith. That right was recognized and upheld by the common law long before written Constitutions were framed. It is only by totalitarian states, and by those who insist on state totalitarianism in education, that this right is denied.

All of the foregoing has been well summed up, and embodied in our constitutional law, by this Court in *Meyer v. Nebraska*, 262 U. S. 390 (pp. 399, 400):

"Without doubt, it (natural, common law liberty) denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children, to worship God according to the dictates*

of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Italics ours.)

The same basic principles are well stated in *Matter of Livingston*, 151 App. Div. (N. Y.) 1, 7.—

In *Denton v. James*, 107 Kans. 729 (193 Pac. 307), it is said:

"Sometimes it is declared that the rearing of children is a function which the state delegates to parents, and which it may resume at will, for its welfare, through welfare of the child. *The rearing of children is not in fact a function delegated by the state to the citizen, any more than the begetting of children is a delegated state function, and the theory of government recognized by the declaration is responsible for absolutism in its most tyrannical form.* . . . The interest which a parent has in the nurture of his own offspring, and in hearthness to them for that purpose, lies in a different plane from that occupied by property; *it transcends property. On the child's side, it has no higher welfare than to be reared by its parents. The state has no higher welfare than to have children reared by their parents, and free government is instituted for the protection and benefit of parenthood as one of the natural rights which the citizen possesses.*" (Italics ours.)

(4) Since it is the parent, and not the State, who has both the primary right and the primary duty of educating his child, it necessarily follows that the teacher—whether public or private—must be regarded as primarily the agent or delegate of the parent, and not exclusively as the agent or delegate of a State omnipotent over education.

The principle above stated by this Court in the *Meyer* and *Pierce* cases was nothing new. It had been recognized

since the foundation of the Republic and is nowhere better expressed than in the opinion of the Court of Quarter Sessions in the early case of *Commonwealth v. Armstrong*, 1 Penna. Law Journal Reports (1848) 392, 393-4 and 396-8:

"The authority of the father results from his duties. He is charged with the duties of maintenance and education. These cannot be performed without the authority to command and enforce obedience. *The term education is not limited to the ordinary instruction of the child in the pursuits of literature. It comprehends a proper attention to the moral and religious sentiments of the child.* . . . No teacher, either in religion or in any other branch of education, has any authority over the child, except what he derives from its parent or guardian; and that authority may be withdrawn whenever the parent, in the exercise of his discretionary power, may think proper. . . .

"*It is dangerous to depart from established principles. Parental authority is not to be subverted so long as it is exercised within the limits which the law has prescribed.*" (Italics ours.)

Of this decision Chancellor Kent of New York wrote:

"I have received and read with much pleasure your opinion in the case of *Commonwealth v. Armstrong* and I agree with your reasoning and conclusion." (1 Penna. Law Journal Reports 398.)

The same fundamental principle was repeated and unanimously approved in every court of New York in the previous attacks on the New York Plan for Released Time by Joseph Lewis, the appellants' predecessor. (127 Misc. 135, 139-40 (Sup. Ct. Albany Co., Staley, J., 1926); 219 App. Div. 233, 238-9 (3rd Dept., 1927); 245 N. Y. 195 (1927), rehearing denied 245 N. Y. 620; 193 Misc. 66 (Elsworth, J., 1948); appeal dismissed 299 N. Y. 564.)

(5) Appellants' counsel have suggested that the religious freedom of parents, and their right to control the education of their children, could be adequately safeguarded by sending children to private or parochial schools.

Such an argument finds no support in justice, practicality or sound reason, and runs directly counter to established principles of constitutional law.

Why should a religious parent be required to pay taxes for the public school, if the only escape from his fear of secularism in education is to send his child to a private or parochial school which may or may not exist in his community, and which may or may not be within his means or meet his convictions?

The public school is not—except in the mind of appellants—the vassal of an all-powerful secular State. It is an agency created by the State to assist parents in discharging their primary duty of educating their own children. By sending his children to the public school, the parent does not forfeit, waive or suspend his fundamental constitutional rights and religious convictions. The parent of a public school child is not a second-class or inhibited citizen. Nor is the public school child himself the mere creature or chattel of the State—even during school hours.

D. Decisions upholding the rights of parents in matters of public education

The courts have consistently recognized and upheld the right of the parents, exercising liberty of conscience, even to reject courses prescribed by the public school, in order to give other and different instruction, or to fulfill religious exercises, outside the school.

(1) In *School Board v. Thompson*, 24 Okla. 1 (103 Pac. 578), the school authorities of the public school had prescribed *singing lessons* as part of the compulsory curriculum. The parents of certain children refused to permit them to take these lessons, and requested that they be excused. The school authorities declined this request and, when the children refused to participate in the singing exercises, they were expelled. The Court not only reinstated the children by mandamus, but held (to quote the headnote):

"At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. * * * The school authorities of this State * * * may prescribe the courses of study and textbooks for the use of the schools. * * * The parent, however, has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, *as the right of the parent in that regard is superior to that of the school officers and teachers.*" (Italics ours.)

In the course of the opinion the Court said (p. 9):

"It is no argument in favor of limiting the common-law authority and control of parents over their children to say that the exercise of such power may result disastrously to the proper discipline, efficiency, and well-being of the schools. It is to be presumed that a normal reasonable man will exercise such authority in a reasonable way."

In *Hardwick v. Board of School Trustees*, 54 Cal. App. 696 (205 Pac. 49), the Court held that a school board could not, against the will of a parent, compel a pupil in a public school to take *dancing lessons* as part of the prescribed curriculum. On the subject of the authority of the parent, the Court said (p. 709):

"In truth, the proposition even extends beyond the question of the ultimate effect of dancing exercises upon minor children. It also involves the right of parents to control their own children—to require them to live up to the teachings and the principles which are inculcated in them at home, under the parental authority and according to what the parents themselves may conceive will be the course of conduct in all matters which will the better and more surely subserve the present and future welfare of their children. . . . *Indeed, it would be distinctly revolutionary and possibly subversive of that home life so essential to the safety and security of society and the government which regulates it, the very opposite effect of what the public school system is designed to accomplish, to hold that any such overreaching power existed in the state or any of its agencies.*" (Italics ours.)

This determination was affirmed by the Supreme Court of California (54 Cal. App., 714; 205 Pac. 56).

In *State v. School District*, 31 Nebraska 552 (48 N. W. 393), the Court awarded a peremptory writ of mandamus requiring the trustees of a public school district to restore to the privileges of the school a pupil whose parent had, on conscientious grounds, refused to allow her to study *grammar*, which was one of the prescribed subjects.

In *Trustees v. People*, 87 Ill. 303 (29 Am. Rep'ts 55), it was held, concerning the public school system of Illinois and the subject of *grammar* (to quote the headnote):

"Where the relator's son passed a satisfactory examination in all the studies taught in a high school, except that of *grammar*, which the father did not desire him to study, and was refused admission to pursue the other branches simply for his deficiency in *grammar*. *Held*, on a proceeding by mandamus, that as the father did not wish his son to study *grammar*,

the son had a right to admission as to the other studies, and that any rule or regulation excluding a pupil on that ground was unreasonable and could not be enforced."

Morrow v. Wood, 35 Wisc., 59 (17 Am. Rep'ts 471), presented the question of the right of the public school authorities to force a child to study the prescribed course in *geography*, which was given according to the common concepts of the shape of the earth, in the face of a contrary direction by the child's father, who held different concepts on religious grounds. The Court held that the parent's right was paramount. The Court said (p. 65):

"Whence, we again inquire, did the teacher derive this exclusive and paramount authority over the child, and the right to direct his studies contrary to the wish of the father? It seems to us it is idle to say the parent, by sending his child to school, impliedly clothes the teacher with that power, in a case where the parent expressly reserves the right to himself, and refuses to submit to the judgment of the teacher the question as to what studies his boy should pursue."

In *State v. Ferguson*, 95 Nebraska 63 (144 N. W. 1039), a parent refused to allow his daughter to attend in public school a class in *domestic science*, which was one of the prescribed courses. She was thereupon expelled. The Court granted a mandamus for her reinstatement. The Court cited *Trustees v. People*, 87 Illinois, 303 (29 Am. Rep'ts 55). *supra*, and said (p. 74):

"Our public schools should receive the earnest and conscientious support of every citizen. To that end the school authorities should be upheld in their control and regulation of our school system; *but their power and authority should not be unlimited*. They should exercise their authority over and their desire to further the best interests of their scholars, with a

due regard for the desires and inborn solicitude of the parents of such children. They should not too jealously assert or attempt to defend their supposed prerogatives. *If a reasonable request is made by a parent, it should be heeded.*" (Italics ours.)

In *Rulison v. Post*, 79 Ill. 567, a public school pupil at the direction of her parents refused to take a prescribed course in *bookkeeping*. She was thereupon expelled. In its opinion the Court said (p. 573):

"Parents and guardians are under the responsibility of preparing children intrusted to their care and nurture, for the discharge of their duties in after life. Law-givers in all free countries, and, with few exceptions, in despotic governments, have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. This is, and has ever been, the spirit of our free institutions. The State has provided the means, and brought them within the reach of all, to acquire the benefits of a common school education, *but leaves it to parents and guardians to determine the extent to which they will render it available to the children under their charge.*" (Italics ours.)

(2) Unless these principles are maintained, a system of State education becomes but the means to mould people to such common likeness in thought, behavior and manners as pleases the predominant power.

It then becomes one more manifestation of that governmental paternalism which eats into democracy and individual freedom like a corrosive chemical.

In *State ex rel. Kelley v. Ferguson*, 95 Neb. 63 (144 W. 1039), the Court said (pp. 73-4):

"The public school is one of the main bulwarks of our nation, and we would not knowingly do any-

thing to undermine it; but we should be careful to avoid permitting our love for this noble institution to cause us to regard it as 'all in all' and destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children. * * * The state is more and more taking hold of the private affairs of individuals and requiring that they conduct their business affairs honestly and with due regard for the public good. All this is commendable and must receive the sanction of every good citizen, but, in this age of agitation, such as the world has never known before, we want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home." (Italics ours.)

E. A dilemma confronting Appellants. "Religious observance and education"

Appellants find themselves in a serious dilemma when confronted with the fact that the Statute which they assail provides comprehensively in a single sentence:

"Absence for religious observance and education shall be permitted * * *"

In their reply brief in the Court of Appeals (pp. 9-10) appellants endeavored to sidestep this dilemma by saying:

"Respondents and intervenor also argue that permitting children to be excused from public school for religious observance, i.e., religious holy days, is in the same category as absence for religious instruction, under the released time program (Sec. 3210, Ed. Law). The question of such holy days is not involved in this proceeding and has not been and need not be argued by these petitioners. That untested statute and practice can carry no weight here. Until such practice and the statute and regulations permitting it have been

held authoritatively to be constitutional, the subject matter has no possible bearing on the issue of the constitutionality of the New York released time system." (Italics ours.)

Parenthetically, we point out that the Statute does *not* make the restriction of "religious observance" to "religious holy days" which the appellants thus attempt to read into it.

Of this statutory fusion of "religious observance and education" the opinion of the Court of Appeals said (R. 121):

"Excuses from attendance are permitted for many good reasons; among others, children are excused from school on holy days set apart by their respective faiths, thus producing a most obvious form of divisiveness, not paralleled in the released time program. *Indeed we are all agreed that refusal to excuse children for that reason would be an unconstitutional abridgement of freedom of religion.* If it be constitutional to excuse children of a particular faith for entire days for such a religious purpose, it seems clear, by a parity of reasoning, that it is also constitutional, under the circumstances here presented, to excuse children of whatever faith one hour a week for another and similar religious purpose." (Italics ours.)

By what process of reasoning can it be claimed that the Constitution *requires* the State to excuse children of a particular faith or denomination, at parental request, for "religious observance," while insisting that the same Constitution *forbids* the State to excuse children of all faiths, likewise at parental request, for "religious instruction"?

And how has a civil court authority or competence to determine what is "religious observance" as distinct from

"religious education"; or to insist on constitutional grounds that the "religious observance" for which absence must be granted shall not in itself be or contain "religious education"; or to separate the inseparable in religion, to-wit, the "education" in the "observance" and the "observance" in the "education"? As said of old (*Deuteronomy*, ch. 12, v. 28):

"Observe and hear all these words which I command thee, that it may go well with thee, and with thy children after thee for ever."

Every assembly in a church for spiritual purposes is inherently both religious observance and religious education.

A thesis that the United States Constitution commands absence for the one but forbids absence for the other would plunge the subjects of Church and State and of abridgment of the freedom of religion into a speculative abstruseness for which a civil court has neither the means nor the jurisdiction.

If, as appellants argue, it is "divisive" to release children in accordance with their parents' request for religious instruction, it is much more "divisive", as the Court of Appeals said, to release children, in accordance with the mandate of the same Statute, for religious observance. Children released for religious instruction are excused all together at the same time on the same day,—Catholics, Jews and Protestants alike. When it comes to religious observance, however, children of each faith or denomination are released on separate occasions in accordance with the observance required by their particular faith or denomination.

F. The New York Education Law negatives the predicates of the Appellants' arguments

(1) Appellants argue that the program of permitting absence by children, whose parents voluntarily ask it, for one hour each week for the purpose of religious observance or of religious instruction outside the public school premises, is unconstitutional because

"pupils compelled by law to go to school for secular instruction are released in part from their legal duty, upon the condition that they attend the religious classes." (Petition, Par. THIRTEENTH, R. 20).

This argument has many conclusive answers.

The law of New York says nothing about compelling children "to go to school for secular instruction", or that education thereunder shall be exclusively within the public school building itself or any other building. The phrase "secular education" is nowhere mentioned in the Education Law.

Nor has the State of New York "legally prescribed and required" legal duty or hours which any absence recognized and permitted by the Education Law itself can be said to curtail or violate.

Appellants are entirely mistaken when they say (their brief, p. 43):

"The New York statute requires all children not attending parochial or private schools to attend public school for 'full time day instruction'."

There is no such requirement. The New York statute requires simply that children shall receive an education either "at a public school or elsewhere" during 190 days of each school year, and that they shall be in regular attendance during the time the appropriate public schools

are in session, subject to such reasonable absences as the law itself recognizes and permits (Education Law §§3204, 3210). In fact, they do not have to attend any school, public or private, but may be educated by their parents at home or "elsewhere". *People v. Turner*, 277 App. Div. 317, 319 (4th Dept., 1950), quoted *supra*, page 8. As the Court of Appeals recognized in the case at bar, and as the Board of Education maintains here (its brief, pages 27-8), the requirements of the statute (Section 3204) are fully satisfied if part of the child's time is spent "at a public school" and part of it is spent "elsewhere", provided the State's minimum requirements are met (Rec. 121-2).

Moreover, as the Court of Appeals pointed out in the case at bar

"The Education Law does not fix the number of hours that constitute a school day" (R. 121).

And the New York City Board of Education has in fact provided more days than the 190 required by Section 3204 (R. 41-5).

The only requirement as to classes—whether in the public school or "elsewhere"—is that they shall provide for "at least" instruction in the ten common school branches of reading, writing, arithmetic, spelling, the English language, geography, United States history, civics, hygiene* and physical training, to which, by recent amend-

* In 1950, at the request of representatives of the Christian Science Church, the Legislature enacted an amendment to Section 3204 dealing with the required teaching of hygiene. This amendment provides

"Subject to rules and regulations of the Board of Regents, a pupil may be excused from such study of health and hygiene as conflicts with the religion of his parents or guardian."

In approving this amendment, the Governor filed a memorandum which stated that the bill

"merely gives to the Board of Regents the power to make such adjustment as it believes necessary to assure the religious liberty of

ment has been added the history of New York (Education Law §3204[3]). These requirements apply equally to pupils not enrolled in the public schools (Education Law §3204 [2]).

There is no requirement that the entire school day shall be spent by each pupil in instructions in those ten branches and in none other.

There is no specification of the kind or nature of instruction which *must* be given to every pupil during the remaining hours of the school day.

All such matters have been left to the discretion respectively of local school authorities, subject to the reasonable requests of parents. (*People ex rel. Lewis v. Graves*, 219 App. Div. 233, 237-8, *affd.* 245 N. Y. 195 [1927]).

(2) Nor is there any requirement in the New York Education Law that the whole of a child's education shall be given in one place only.

In its opinion the Court of Appeals truly said (R. 121):

"Moreover, parents have the right to educate their children elsewhere than in the public schools, provided the State's minimum requirements are met (Education Law, §3204; *Pierce v. Society of Sisters, supra*), and thus, if they wish, choose a religious or parochial school where religious instruction is freely given. That being so, it follows that parents, who desire to have their children educated in the public schools but to withdraw them therefrom for the limited period of only one hour a week in order to receive religious instruction, may ask the public school for such permission, and the school may constitutionally accede to this

the child and its parents consistent with the requirements of public education and public health * * *

"I believe it to be a simple fundamental of freedom of religion that the state shall compel no child to learn principles clearly contrary to the basic tenets of his religious faith."

parental request. There is nothing in the Constitution commanding that religious instruction may be given on the Sabbath alone, and on no other day."

In line with this, the Board of Education of New York City in its brief herein at page 27 takes the entirely reasonable and proper position that a parent

"has the right to have his child receive part time instruction in public schools and part time instruction in the parochial schools." (Italics ours.)

Appellants concede that under the doctrine of the *Pierce* case a parent has an absolute constitutional right to keep his child out of the public school for full time instruction elsewhere—either in a private or parochial school or at home. On what conceivable theory can they claim that a parent is under an absolute constitutional prohibition against being permitted by statute briefly to keep his child out of the public school for religious instruction for one hour a week in a parochial school or other religious center?

(3) There is, of course, a physical and mental limit upon the time during which any child is capable of beneficially receiving formal, required instruction in school and also at home through fulfillment of the school's required "home-work".

While the New York Education Law does not specify the number of hours which shall be fixed for any school day, we believe it to be the recent practice of local boards of education to fix a school day of five to five and one-half hours, not including the lunch period. It is generally recognized that such a period of time, augmented by time absorbed by required "home-work", closely approximates, if it does not completely exhaust, the total number of hours of the child's time, exclusive of time necessary for

rest and recreation, which may be efficiently used for formal instruction.

Certainly, the State itself has the lawful power to recognize and determine that such is for the average child the limit of capacity for formal instruction.

For the courts ever to uphold as a principle of law that the State not only can but *must* monopolize the entire instructionable day of the average child for such educational content and ideology as it might choose to impose, would be to nullify the parent's fundamental rights in the education of his children, and to sanction a means for overwhelming both religion and liberty.

(4) At page 63 of their brief appellants' counsel say:

"The effectiveness of the released time program (to the extent that it is effective) rests upon the compulsory school attendance law. It operates only because the state has the power to corral children and require them to obtain secular education for a given number of hours weekly."

Precisely the same is true as to the whole system of parochial and private education constitutionally guaranteed by the *Pierce* case. If a child is enrolled in a parochial school furnishing sectarian education, he attends there under the "compulsion" of the same sections of the same Education Law as apply to another child enrolled in the public school across the street.

Appellants' argument on this score,—advanced in the name of "freedom of religion"—amounts to a contention that the state is constitutionally *compelled* to require attendance on an "all or nothing" basis,—either all parochial school or all public school; and that it is constitutionally forbidden to recognize even the possibility of such a thing as enrollment in the one accompanied by brief part time enrollment in the other.

POINT II

The New York statute authorizing released time is designed to give reasonable protection to liberty of conscience and freedom of religious profession on the part of parents.

No constitutional provision erects a gateless "wall of separation" between the State and parents, or between parents and their children, in the matter of public education.

(1) Every thoughtful observer of contemporaneous American trends in thinking is aware of an increasing conviction throughout our country that the crisis at home and abroad is a *moral crisis*, and that the real danger which confronts us is not the massing armed power of Soviet Russia which we can defeat, but rather is in our own midst and consists of the deadening secularism in America and the western world which threatens to choke the sources of spiritual power.

More and more people in America are becoming anxiously concerned with the warning given by President Wilson that no nation can long be preserved materially unless it is first preserved spiritually. More and more people are realizing that daily the truth becomes clearer that we have been looking to our great wealth and material resources as a sort of Maginot Line; whereas our real defenses and our leadership in the world as well as the integrity of our national life must rest on and derive from spiritual vitality, verity and power.

In consequence, more and more people have become concerned lest we have been taking too much for granted in and about our vast systems of secular education, and in the common assumption that "education" as a term

carries as a corollary "character" and "integrity" and "moral and spiritual values".

. How far this increasing concern has affected even the most outstanding experts in our present system and practice of education, is shown by the following quotations from the annual report made several months ago by Dr. Oliver C. Carmichael, as President of the Carnegie Foundation for the Advancement of Teaching (p. 15):

"The recent revelations of low standards in high places, of outright corruption in public office, of widespread organization of gambling and crime, of basketball and football scandals and of honor code violations, should surely be sufficient to arouse the American people and to shock educational leaders into a re-examination of their goals and methods. In a country which numbers only seven per cent of the population of the world, but which has more young men and women in college than all the rest of the world combined, the educational system can scarcely escape a share of the responsibility for the conditions revealed. These are, but symptoms of a collapse of moral and spiritual values which should stir to action parents of children, leaders in public affairs, schools, colleges and churches."

And in the same report Dr. Carmichael further said (p. 20):

"At present there is no adequate machinery in operation for discovering the nature of the obscure forces at work that undermine *real* education and, therefore, no means of coping with them. * * * Yet there is no doubt that the intellectual, moral, and spiritual tone of an institution is more important than its libraries and laboratories, its classrooms and student centers, or even its researches and publications." (The italics are Dr. Carmichael's.)

When educational leaders like President Garmichael thus recognize these "symptoms of a collapse of moral and spiritual values", with which our present system of education has "no means of coping", deeply concerned parents and thoughtful citizens have a right to feel that constitutional interpretations which would exclude all possibility of mutual accommodation in this matter between parents and the State could "scarcely escape a share of the responsibility for the conditions revealed."

(2) The public schools of today, with attendance compulsory for most of our children, have expanded to the dimensions of life itself. They provide for the education of children in practically every human interest except religious faith. They extend their secular instruction to matters of origin, destiny and human relationships, with all of which religion is vitally concerned.

In the opinion of multitudes of parents, the omission and ignoring of religion by such schools can convey (however unintentionally) a powerful disparaging implication and inclination of mind.

These parents have the constitutional right to a conviction, and indeed have the conviction deep in their hearts, that there is in the present system of public secular education at least an implied negation and exclusion of spiritual ideals and spiritual faith; and that such implied negation and exclusion are at the root of much of the disorders and evils of our times. They desire, and have the right, not to be burdened after their children's "business hours" with the task of undoing the implications which they fear.

The New York Statute does no more than to give to such parents a means of fulfilling that conviction and of discharging what they regard as their high duty not only toward their children but toward the system of public

education itself and toward democracy itself. It enables them to show to their children that Education and the State are not opposed to religion and do not invite it to be ignored, and that the State does not intend to negate or disparage the conscience and faith of the parents by monopolizing the child's "business hours" for a wholly secular education.

Who has the "right" to deny such parents that right?

Do those who would so impose *their will* get their "right" to do so from some assumed privilege of primacy for their own beliefs, or from some alleged majority will, or from some supposed prerogative of the State?

An affirmative answer to any of these three alternatives denies the doctrine of the *Oregon School Law* case and strikes at the basic freedom on which all individual liberty must rest. Yet it is an affirmative answer which these appellants are now asking this Court to force upon an unwilling State of New York, notwithstanding that, in the American system, it is the parent, not the State, who has the guidance of the mind of the child:

(3) Article 26 of the *Declaration of Human Rights* adopted by the General Assembly of the United Nations on December 10, 1948 provides:

"(3) Parents have a prior right to choose the kind of education that shall be given to their children."

And the proposed *International Covenant on Human Rights and Measures for Implementation*, adopted in May 1951 by the United Nations Commission on Human Rights, provides:

"In the exercise of any functions which the State assumes in the field of education, it shall have respect for the liberty of parents to ensure the religious education of their children in conformity with their own convictions."

(4) Under the secular techniques of our present public and compulsory educational system, the First of the Two Great Commandments is allowed no place in the curriculum of public-school study.

What, then, are the rights of parents who feel that this exclusion will convey to their children that the First Commandment has no primary place in life or allegiance or even is of no account, and that in a generation or two the Second Commandment, which is like unto the First, must consequently follow it into neglect and oblivion?

Overseas, we have seen to our terrible cost that great peoples who were led to embrace a system of ideological education which omitted the First Commandment, soon accepted the thesis that the Second Commandment had no application where it interfered with the purposes of the State and that any kindness which interfered with the official ideology would be severely punished as a sin against the State and even as treason.

At home, a member of this Court recently said in a broadcast statement:

"We need the faith of our fathers. We need a faith that dedicates us to something bigger and more important than ourselves or our possessions. Only if we have that faith will we be able to guide the destiny of nations, in this the most critical period of world history."

As to what was "the faith of our fathers" we have the answer in the Declaration of Independence, the reading of which in our public schools would by appellants' logic and by some of their supporters be prohibited, on the ground that its declaration that all men are endowed by their Creator with certain inalienable rights, including the right to be free and equal, is religious doc-

trine which the First and Fourteenth Amendments to the Constitution exclude from profession or teaching on public property.

(5) It cannot be too strongly emphasized that what appellants here demand is the complete destruction of a purely *voluntary* plan merely because they do not wish to take advantage of its permissive features for their own children.

What appellants say in substance is this:

"Because we do not want our children to be excused at 2 P. M. on Wednesday for religious instruction elsewhere, therefore all other parents are forbidden by the Federal Constitution to ask to have their children so excused".

Let us consider for a moment the inevitable implications of a holding such as appellants now ask.

In *West Virginia Board of Education v. Barnette*, *supra*, 319 U. S. 625, the Jehovah's Witnesses, on conscientious grounds, asked to have their children excused from the flag salute ceremony. They did not ask, and this Court did not require, that the flag salute ceremony be abolished *in toto* for all other children. On the present appellants' theory, if any one parent objected to the flag salute on religious or anti-religious grounds, he would have a constitutional right to abolish it for all other children, because otherwise there would be divisiveness and his child would be conspicuous.

By recent statute, the State of New York has provided in substance that Christian Science children may be excused from the study of such portions of hygiene (*e. g.* the germ theory) as conflict with their religious beliefs. On the present appellants' theory, a single Christian

Science parent could require the complete abolition of such study from the school curriculum for all children.

In the *McColum* case Mr. Justice Jackson said (333 U. S. 203, at p. 235):

"If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds".

Appellants would go even further. By eliminating, on constitutional grounds, any possibility of accommodation between the public education system and parental consciences, they would force all parental consciences and public education itself to conform to their own views. In other words, they insist that the United States Constitution establishes their own freedom of conscience and belief as the compulsory norm for all other parents' freedom of conscience and belief!

POINT III

The New York statute and regulations present a situation altogether different from that of the *McColum* case.

(1) Throughout their brief appellants rely chiefly, if not solely, on the decision of this Court in *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 (1948).

The holding of the *McCollum* case was carefully analyzed, and its application distinguished, by Judge Froessel for the Court of Appeals. We cannot do better than to adopt and quote his words (R. 116):

"In support of their contention, appellants rely primarily on *Illinois ex rel. McCollum v. Board of*

Educ. (333 U. S. 203). There, a local board of education in Champaign County, Illinois, participated in a released time program which differed radically from the one before us. There was no underlying State enabling act. Religious training took place in the school buildings and on school property. The place for instruction was designated by the school authorities. Pupils taking religious instruction were segregated by school authorities according to faiths. School officials supervised and approved the religious teachers. Pupils were solicited in school buildings for religious instruction. Registration cards were distributed by the school, and in one case printed by the school. None of these factors is present in the case before us, and, accordingly, the Supreme Court's holding that the Champaign released time program was constitutionally invalid is not controlling here.

"In the New York City program there is neither supervision nor approval of religious teachers and no solicitation of pupils or distribution of cards. The religious instruction must be outside the school building and grounds. There must be no announcement of any kind in the public schools relative to the program and no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction. All that the school does, besides excusing the pupil is to keep a record—which is not available for any other purpose—in order to see that the excuses are not taken advantage of and the school deceived, which is, of course, the same procedure the school would take in respect of absence for any other reason.

"It is manifest that the *McCullum* case (*supra*) is not a holding that all released time programs are per se unconstitutional. The Supreme Court's decision is limited to the fact situation before it. Thus, Mr. Justice Black, writing for the Court, reviewed the evidence so far as undisputed and stated (p. 209) that the 'foregoing facts' (emphasis supplied) 'show the use of tax-supported property for religious in-

struction and the close co-operation between the school authorities and the religious council in promoting 'religious education.'

"In the instant case, there is no 'use' of tax-supported 'property or credit or any public money' 'directly or indirectly' 'in aid or maintenance' of religious instruction (*People ex rel. Lewis v. Graves*, 245 N. Y. 195, motion for reargument denied 245 N. Y. 620, affg. 219 App. Div. 233, affg. 127 Misc. 135), and there is no such co-operation as in the *McCollum* case (*supra*) between the school authorities and the religious committee in promoting religious education.

"Other justices who wrote in the *McCollum* case were even more explicit in placing boundaries on the determination. Mr. Justice Frankfurter, in a concurring opinion in which three other justices joined, stated:

"Of course, "released time" as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication' (p. 225).

"The substantial difference among arrangements lumped together as "released time" emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does "released time" operate in Champaign? (p. 226)

"We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial. Different forms which "released time" has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable' (p. 231).

"Mr. Justice Jackson, in addition to agreeing with the limitations expressed by Mr. Justice Frankfurter,

added reservations of his own, and stated: 'we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain' (p. 232),

and that 'it is important that we circumscribe our decision with some care' (p. 234).

"Mr. Justice Reed, who dissented from the Court's holding, pointed out (pp. 239-240) that expressions in the opinions of his colleagues 'seem to leave open for further litigation variations from the Champaign plan.' "Thus, in addition to the reference in Court's opinion to the 'foregoing facts' of the Champaign plan as showing its unconstitutionality, *we have five other justices expressly agreeing that released time as such is not unconstitutional.*" (Italics ours.)

(2) In the opinions of both Mr. Justice Black and Mr. Justice Frankfurter emphasis is placed on the finding that by the Champaign Plan of Released Time both Church and State were "*integrated*" in the same building, under the same supervisory authority, and in the same classrooms, with the consequent common "use of tax supported property" (pp. 209, 231).

Mr. Justice Frankfurter held that this integration was "confusing, not to say *fusing*, what the Constitution sought to keep strictly apart" (p. 231).

In the New York Plan there is neither such "integration" nor such "*fusing*". There is nothing more than a recognition by public authority that religious instruction at the request of those parents who desire it for their own children is at least as valid an excuse for absence as instruction in music or other matters regularly and consistently recognized as legitimate excuses under the State Education Law.

(3) The differences between the two Plans are well set forth as follows in the opinion of Mr. Justice Elsworth in the second *Lewis* case (193 Misc. 66, 72) and in the opinion of the Special Term in the case at bar (R. 89-91):

"Champaign Plan"

1. No underlying enabling state statute.*

2. Religious training took place in the school buildings and on school property.

3. The place for instruction was designated by school officials.

4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils.

5. School officials supervised and approved the religious teacher.

New York City Plan

1. Education Law, §3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

2. Religious training takes place outside of the school buildings and off school property.

3. The place for instruction is designated by the religious organization in cooperation with the parent.

4. No element of segregation is present.

5. No supervision or approval of religious teachers or course of instruction by school officials.

* There was no Illinois statute which declared that "absence for religious observance and education shall be permitted."

"Champaign Plan**New York City Plan**

6. Pupils were solicited in school buildings for religious instruction.

6. School officials do not solicit or recruit pupils for religious instruction.

7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds.

7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved.

8. Non-attending pupils isolated or removed to another room.

8. Non-attending pupils stay in their regular classrooms continuing significant educational work.

9. No credit given for attendance at the religious classes.

10. No compulsion by school authorities with respect to attendance or truancy.

11. No promotion or publicizing of the released time program by school officials.

12. No public moneys are used."

(4) Indeed, the basic factual difference between the *McCollum* case and the present case is graphically stated at pages 41-2 of appellants' own brief, where it is said that the proof in the *McCollum* case

"established that general Protestant instruction was given in the regular classroom in the presence of the regular public school teacher, while Catholic instruction was given in basement rooms and Jehovah's Witnesses and Lutherans were excluded altogether."

(5) The stenographic transcript of the oral argument in the *McCollum* case indicates that both the members of this Court and the counsel for the appellant Mrs. McCollum were fully aware of the distinction between the New York Plan and the Champaign Plan then under attack. That transcript shows the following colloquy (pp. 26, 27):

"Mr. Justice Jackson. If your position is sustained, how would that affect the Released Time Plan in New York?

Mr. Dodd [Counsel for appellant McCollum]. The Released Time Plan has been sustained since 1929 in New York. It has recently been sustained in Illinois, and more recently sustained in California. *I don't think it would be affected by an adverse decision relative to this situation.*

.

Mr. Justice Frankfurter. You said the New York system could survive although this system should fall. What are the decisive elements that differentiate the two?

Mr. Dodd. The point is that here they are to take their religious lessons *in groups in the schools* where there will be, somewhat of necessity, unless the world has changed as to religion, some development of friction and trouble as between religious groups." (Italics ours.)

(6) In line with the position thus stated on the argument by Mrs. McCollum's counsel, his brief cited, with apparent approval, the earlier decisions of the New York Courts in *People ex rel. Lewis v. Graves*, 219 App. Div. 233, and 245 N. Y. 195; and at page 19 he carefully distinguished and limited the issues in his own case in these words (p. 19):

The issue *is* for the first time presented to this Court involves (1) a public service to sectarian public

school instruction through both personal help and school facilities, (2) an instruction in the school building and during school hours which will segregate the various religious and non-religious groups in the public school, and (3) a control by the school authorities of what religious views may be taught and how they may be taught."

And in his conclusion Mrs. McCollum's counsel again formulated the issue as follows (p. 34):

"The Appellant asks this Court to determine whether sectarian groups may be permitted to teach in public school buildings during school hours, and substantially as part of the public school system. If such teaching is permitted, Appellant asks if school authorities may be permitted to determine who shall teach and what may be taught."

In his Reply Brief Mrs. McCollum's counsel said (p. 13):

"New York may be regarded as the leader of the plan of released time, and explicitly limits it to 'outside of the school buildings and grounds.' The Illinois Supreme Court has sustained a similar plan. * * * *The released time plan is directly opposed to the plan at issue in the present case* * * *

"It is clear here, also, that the released time plan lends no support to Appellees' plan of sectarian education of public school pupils in public school buildings and during school hours." (Italics ours.)

(7) In the footnote at page 34 of their brief, appellants' counsel cite an opinion of the Solicitor of the Interior Department as applying the *McCollum* decision to prohibit released time instruction in Indian schools; and, in the footnote at page 58, they cite the recent Organic Act of Guam which forbids the use of public money or property directly or indirectly for sectarian purposes.

Hence, it is important for this Court to know that the Solicitor of the Interior Department has recently rendered a further opinion (M-36106, dated October 30, 1951) approving the legality, under this Organic Act, of a released time program for public school students in Guam copied directly from the New York plan, and has therein stated:

"I share the view of the New York courts that the *McCullum* decision did not necessarily outlaw all released-time programs; and that programs similar to the New York City program (e. g. the proposed program for Guam) are not violative of the First Amendment."

(8) At page 22 of their brief appellants' counsel now assert:

"In the *McCullum* case, briefs *amicus curiae* in opposition to released time were submitted in behalf of the Baptists Joint Conference Committee on Public Relations, representing the largest Protestant denomination in the United States * * *."

While it is quite true that the Baptists Conference opposed the Champaign plan in the *McCullum* case, appellants fail to acknowledge that, with respect to the altogether different New York Plan now presented, the New York Court of Appeals accepted a brief *amicus curiae* from the National Council of the Churches of Christ in the United States of America, representing substantially all the major Protestant and Orthodox bodies of the United States, *including the Baptists*; and that in such brief the National Council strongly supported the New York Plan. (See Official Report, 303 N. Y. 161, 166.)

(9) At pages 22 and 57 of the appellants' brief their counsel cites "*2 Stokes, Church and State in the United States*, 534, 548" for propositions which the text in no way

sustains. We are, however, glad the appellants thus acknowledge as an authority this publication by Dr. Anson Phelps Stokes, former Secretary of Yale University, which is the latest exhaustive and learned discussion on the subject.

In Volume II of that monumental work, Dr. Stokes discusses and analyzes at great length the *McCollum* case dealing with the altogether different Champaign Plan of Released Time (pp. 515, *et seq.*), and concludes (p. 522):

"It (the *McCollum* decision) does not, of itself, seem to prevent either the objective study of the history of religion in public schools under public-school teachers (which Dr. C. Morrison has so long advocated), *or the dismissal of students to study religion in the churches or synagogues of their choice, such as is provided by the laws of New York and other states, and is advocated by many representative Protestant, Catholic, and Jewish groups.*" (Italics ours.)

And at page 536, in referring to the decision of the Court of Appeals in the first *Lewis* case (245 N. Y. 145), Dr. Stokes says:

"This decision is of special interest because it was concurred in by Chief Justice Benjamin N. Cardozo (1870-1939), later a member of the Supreme Court of the United States, and recognized as one of the greatest of American jurists."

On the same page (536) Dr. Stokes refers to like statutes authorizing the Plan in the following states: California, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Minnesota, New York, North Dakota, Oregon, Pennsylvania, South Dakota.

(10) The appellants' brief states (p. 32) that the undersigned, Charles H. Tuttle, submitted one of the briefs *amici curiae* to the United States Supreme Court in the

McCollum case. That fact, standing alone, is true; but it is not the whole fact. That brief was submitted on behalf of the Protestant Council of the City of New York. It was confined to informing the Court about the New York Statute and Plan of Released Time. It did not advocate the altogether different Plan, known as the Champaign Plan, which was the sole Plan in issue in the *McCollum* case. We attribute to that brief *amicus curiae* about the New York Statute much of the emphasis in the opinions in the *McCollum* case that the Court was only passing on the particular Plan (the Champaign Plan) then before it.

POINT IV.

The Petition presents no triable issue of fact.

This is so for a number of separate reasons:

(1) This is a statutory appeal under Section 1257(2) of Title 28 of the U. S. Code permitting an appeal "where is drawn in question the validity of a statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity" (R. 145-6).

The "Jurisdictional Statement" submitted to this Court by the appellants and omitted in the printing of this Record (R. 152, fol. 167) cites and quotes the above statute as *the* "Statutory Provision Sustaining Jurisdiction" and as the reason why "the appeal is within the jurisdiction of the United States Supreme Court." The "*Jurisdictional Statement*" assigns no other ground of jurisdiction.

The only statute claimed herein to be "repugnant to the Constitution of the United States" is Section 3210-1(b) of the New York Education Law.

If that Statute, as and when enacted, was *not* "repugnant to the Constitution of the United States", then the statutory ground for this statutory appeal and for the jurisdiction of this Court in this case is exhausted. *That* issue is solely one of constitutional law; and a determination thereof against repugnancy resolves the only federal question which can be presented through the channel of this appeal, and which can supply jurisdiction.

The petition makes no claim that the regulations are not authorized by the Statute if the Statute itself be valid. It asks for no revisions thereof or elimination therefrom.

A question whether Section 3210-1(b), as and when enacted, was repugnant to the Constitution, could not possibly present a question of fact to be tried.

A question as to whether there has been unconstitutional administration of a constitutional statute in such wise as to injure the plaintiffs' constitutional rights is not one which can be brought to this Court by direct appeal. It can be brought here "*only on petition for a writ of certiorari*": (*Zucht v. King*, 260 U. S. 174, 177.)

(2) Moreover, Paragraph Twenty-third of their petition states the issue which the appellants tender and what they want. They want an adjudicatory declaration that (R.22):

"TWENTY-THIRD: Rescissions of the aforesaid regulations and discontinuance of the released time program are *non-discretionary* duties imposed upon the respondents by the Constitution of the United States and of the State of New York as aforesaid."
(Italics ours.)

The prayer for relief in the petition is identical with the issue thus framed. It prays for an order directed against the respondents commanding the respondents

forthwith and unconditionally to "abrogate and rescind all regulations" "and to discontinue the released time program": *in toto* (R. 23).

Thus, the sole issue tendered by the petition was whether or not the New York Statute authorizing absence for religious observance and instruction under regulations to be established by the State Commissioner of Education could constitutionally be a lawful source of power for any regulations at all.

The appellants' claim now is, and can only be, that the statutory authority to promulgate regulations is annulled because the Constitution of the United States has "imposed" the "non-discretionary duties" of not fulfilling at all the purpose expressed in the Statute's primary clause.

Hence, both logically and literally, the appellants' petition comes down to the proposition that the Constitution of the United States has "imposed upon the respondents" the "non-discretionary duties" of not permitting absence for the purpose for which the Statute directs that absence shall be permitted. *That issue is one of constitutional law.*

If the Statute permitting such absences was valid when enacted, the included duty to establish regulations therefor was then also valid. Any "non-discretionary duties" not to establish regulations for the purpose could arise only if, as of the time when the statute was enacted, the Constitution of the United States then forthwith "imposed upon the respondents" the "non-discretionary duties" of disregarding the Statute altogether.

(3) In the Supreme Court, Kings County, Mr. Justice DiGiovanna said of the petitioners' position as stated before him in their brief (R. 96):

"The attorney for the petitioners, in his memorandum relative to the merits of the petitioner's application and the legal sufficiency of the petition says

(p. 9): 'It is submitted that it is not the details of a particular released time program which render it violative of the First Amendment; it is the basic concept—the *raison d'être* of the program, which causes it to run afoul of the Amendment as interpreted in the *Everson* and *McCollum* decisions.'

And Mr. Justice DiGiovanna then concluded (R. 96-7):

"In the face of a holding that the statute attacked is constitutional, we next come to the question of whether triable issues are presented. What are the issues raised by this proceeding other than the question of constitutionality? There are no degrees of constitutionality. Neither does compliance with the statute render it constitutional if it is unconstitutional, nor does administrative error render it unconstitutional if it is constitutional. * * * This court cannot agree, therefore, with the argument of counsel for the petitioners that it has before it the question of whether or not the program is being conducted in accordance with the regulations. Indeed, there is no proof that it is not, while there is proof, immaterial to this special proceeding, that it is being so conducted in the particular schools attended by the children of these petitioners. In fact the attorney for the petitioners, in the citation from his brief above quoted, concedes that fact. The question validly presented by this proceeding is solely addressed to the constitutionality of the statute and regulations."

Subsequently the appellants moved for reargument on two grounds, to wit: (1) the absurd ground that Mr. Justice DiGiovanna may have overlooked Mr. Justice Black's opinion in the *McCollum* case, and (2) the further ground that he had "misinterpreted the factual theory of petitioners' proceeding".

Mr. Justice DiGiovanna denied the motion with an extended opinion (N. Y. L. J., Aug. 23, 1950, p. 299, col. 5).

Only a portion of that opinion is quoted in the appellants' brief (p. 73). We annex the full text as Appendix A to this Brief.

In the Appellate Division, the minority held the Statute unconstitutional as a matter of law, and hence did not consider matters of pleading. The majority said (R. 110):

"Subdivision 1-b of section 3210 of the Education Law, which merely provides that absence from attendance on required instruction shall be permitted for the specified religious purposes under rules to be established, is in no way unconstitutional. Moreover, *if the truth of all of the well pleaded allegations of the petition is conceded*, petitioners have failed to allege facts sufficient to establish any invasion of their constitutional rights by the adoption of the regulations complained of, or the operation thereunder of the 'released time program' (cf. *People ex rel. Lewis v. Graves*, 245 N. Y. 195; *Matter of Lewis v. Spaulding*, 195 Misc., 66). *McCollum v. Board of Education* (333 U. S., 203), which may be readily distinguished on its facts does not require a contrary determination." (Italics ours.)

The opinion of the Court of Appeals decided in the following language, which we believe conclusive, these matters concerning relevancy and sufficiency in pleading according to the State's law (R. 122):

"Appellants assert that in any event triable issues of fact are presented. A basic difficulty with this contention is that appellants now declare that they are prepared to show on a trial matters that have not even been properly pleaded. A great many of their allegations are conclusory in character (*Kalmanash v. Smith*, 291 N. Y. 142, 154), and, as appellants concede, have been lifted bodily from portions of the *McCollum* opinions, without the statement of adequate facts to support them (Civ. Prac. Act, §1288). . . .

"Moreover, many of the conclusory allegations suggest merely a disobedience of the rules and regulations. Such disobedience, while it might warrant the initiation of disciplinary proceedings against any of the offending teachers or principals, would in nowise warrant the relief prayed for, namely, a total discontinuance of the released time program and a rescission of all regulations established by the authorities. It is, of course, possible that a statute and regulations constitutional on their face may be administered in an unconstitutional way (*Snowden v. Hughes*, 321 U. S. 1; *Yick Wo v. Hopkins*, 118 U. S. 356), but in order to invoke this principle it must appear that there is 'an element of intentional or purposeful discrimination' by the enforcement authorities (*Snowden v. Hughes*, *supra*, p. 8). Here there is no allegation in the petition to that effect, and, indeed, even in appellants' brief and in the briefs *amici* supporting their position, 'The offer of proof was not an offer to show a pattern of discrimination consciously practiced' (*People v. Friedman*, *supra*, p. 81). Under the circumstances, whether the released time program is constitutional is solely a question of law, and the case has been so treated by Special Term as well as by the Appellate Division majority and dissenters."

(4) The present petition is modeled very closely upon the petition in the second *Lewis* case (299 N. Y. 564). The chief difference is that the present petition is sprinkled with additional conclusions of law, most of them lifted bodily,—as the Court of Appeals pointed out and as the appellants admit in their brief, p. 11,—from the legal reasoning in portions of the *McCullum* opinions. The prayers for relief in the two petitions are substantially identical.

Let us assume, for the sake of argument, that somewhere in some one of the hundreds of public schools in the five boroughs of New York some overzealous teacher has at some time "violated" some provision of either the

State regulations or the City regulations—*e. g.*, by commenting on the attendance or non-attendance of some pupil upon religious instruction, or by making some announcement in school about the Released Time program. If, after a lengthy trial, the appellants succeeded in establishing the existence of some such "violation," their appropriate remedy—as the Court of Appeals held—would at most be an administrative disciplining of the teacher concerned, and an admonition to observe the regulations more strictly in future. But that kind of disciplining is for the Board of Education or the State Commissioner. It is not the kind of remedy which a court could give in a mandamus proceeding under Article 78 of the New York Civil Practice Act.

Nor is it the kind of remedy which these appellants want or ask for.

An unconstitutional statute or regulation does not become constitutional because people observe it. Nor does a constitutional statute or regulation become unconstitutional because people do not observe it.

(5) The appellants' brief refers to Paragraph ELEVENTH of the petition (R. 19), which was described below by appellants' counsel as the "heart of his case".

Apart from conclusions of law, this paragraph is not materially different in substance from paragraphs 10 to 15 of the petition in the second *Lewis* case (Record on Appeal therein, fol. 40).

Taking its allegations from the standpoint most favorable to appellants, it seems to allege the following (R. 19):

(a) A distribution of signature cards by the Committee or "church authorities" "at or near the public school premises." Appellants do not venture the flat assertion that any cards have been distributed

"at"—much less "in"—public schools. The regulations specifically forbid any distribution of cards or any announcement or comment in the schools relative to the program (R. 16-8, 34), and no school teacher or employee may distribute cards anywhere (R. 34). The petitioners do not ask that the regulations be amended by confining the alleged distribution of cards to any given distance or by not allowing any distribution at all.

(b) A delivery by the public school authorities to the Committee or to religious centers of lists of children whose parents have asked to have them excused. The petitioners do not ask that the regulations be amended by including a prohibition of delivery of any lists at all.

(c) A conclusion of law pure and simple that parents who sign consent cards "thereby enter into an agreement with the public school authorities" for the release of their children for religious instruction outside the school premises. The Statute merely *permits* the absence,—precisely as in the case of any other permitted absence. Neither it nor the regulations call for any contract.

(d) A charge that the religious education given off the school premises is "sectarian"—whatever that may mean. Absence for "religious observance" could, with as much truth and relevancy, be said to be for a "sectarian" purpose. The essence of the New York plan is that the parent and not the public school is making the "sectarian" selection and designating the place. The dismissal from the school is "in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals" (R. 31, 34, 36).

What difference does any of these items make to appellants' case? Not one of them affects the ultimate question here, which is whether the respondent Commissioner and Board are under "non-discretionary duties", as appellants insist, to abrogate the regulations *in toto* and to disregard the mandate of the basic statute altogether and permanently.

(6) At pages 68-9 of his brief, appellants' counsel sets forth in parallel columns the Special Term's description of the New York plan as compared with the Champaign plan involved in the *McCollum* case, plus appellants' conclusory statement as to "what the record shows" as to each item.

On the crucial points of difference (such as the fact that under the New York plan the religious training takes place on a voluntary basis off school property and without the supervision of school officials) appellants admit the correctness of the lower court's conclusions. On certain other items they make conclusory assertions to the contrary, which are immaterial and irrelevant, and with which we do not agree.

In this latter category we may take as an example item 6. Mr. Justice DiGiovanna pointed out (R. 91) that under the Champaign plan "pupils were solicited in school buildings for religious instruction", whereas under the New York plan "school officials do not solicit or recruit pupils for religious instruction."

As to this last, appellants assert that they "deny this and are prepared to prove the contrary".

No. 1 of the New York City regulations expressly provides (R. 30):

"There will be no announcement of any kind in the public schools relative to the program."

And No. 6 of the same regulations prescribes

"There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

If the regulations need amending, there is neither assertion or prayer to that effect in the appellants' petition. In such case, the appellants' remedy would have been to apply to the promulgating authority, and, failing action there, to institute a proceeding to void the offending regulation unless amended or to restrain any offending practice.

(7) The nearest that appellants come to a specific attack on any particular regulation is on pages 20 and 42 of their brief where they assert that Section 2 of the State Commissioner's regulations (R. 15) is unconstitutional, because it provides that "the courses in religious observance and education" conducted off the school premises must be "operated by or under the control of a duly constituted religious body or of duly constituted religious bodies".

The appellants' petition does not ask that this particular regulation be revised or abrogated; and it does not assert that they or anyone else have ever been adversely affected by it or have ever complained about it. The gravamen of the petition is that both the Statute and *all* the regulations be annulled altogether.

The reference in the regulation to "duly constituted religious bodies" should be considered in connection with Section 2 of the New York Religious Corporations Law, which defines a "religious corporation" as "a corporation created for religious purposes", and defines "churches", whether incorporated or unincorporated, as bodies organized for the purpose of "divine worship and other religious observances".

If this particular regulation is unconstitutional as a "censorship of religion", merely because it refers to "duly constituted religious bodies", then innumerable statutes, federal and state, requiring action by the civil authority predicated upon ascertaining a constituted religious body or denomination or a constituted minister thereof, are also unconstitutional as "censorship of religion".

For example, it would then be unconstitutional "censorship of religion" for Congress to provide, as in 10 U. S. Code, §231, that appointments of chaplains in our Armed Forces shall be made only "from among persons duly accredited by some religious denomination or organization, and of good standing therein". Indeed, the appellants' whole reasoning in this case would render unconstitutional *the whole chaplaincy statute itself*, together with its accompanying regulations, because under that statute the Civil Government appoints and commissions the chaplains according to religious affiliation, pays the chaplains with public funds to perform religious services according to their particular faiths, and provides at public expense edifices to which members of that faith may repair whenever "Church call" is sounded on the bugle (R. 131). If "divisiveness" so-called were real and were determinative of unconstitutionality, here it is, and right in our Armed Forces!

Other examples might be multiplied indefinitely. Some of them are given in the footnote.*

* 50 U. S. C. App. §456-g, giving draft exemption to "regularly or duly ordained ministers of religion" and to "students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full time courses of instruction in recognized theological or divinity schools".

26 U. S. C. §101(6) and (18), granting income tax exemption to, and permitting the deduction from taxable income of gifts to, corporations "organized and operated exclusively for religious purposes".

49 U. S. C. §22, authorizing common carriers to give reduced rates to "ministers of religion".

N. Y. Penal Law, §925(b), which penalizes the fraudulent sale of tickets "for admission to or participation in services purporting to be in

Summary and Conclusion

In the *McCollum* case, Mr. Justice Jackson in his concurring opinion said (333 U. S. 237-8):

"It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions."

In the case at bar, we earnestly submit, no matter of "prepossessions" should arise.

The question for judicial determination here is not whether, or to what extent, religious training is a good thing, or what is the best way to give it.

The question is not whether, or to what extent, released time in any form, or in general, is regarded as desirable or undesirable by particular individuals or groups.

accordance with the precepts of any recognized religious creed or faith", and the making of fraudulent representations "as to the nature of the services to be conducted at any place designated or intended to be used as a house of worship".

N. Y. Tax Law, §4(6), granting tax exemption to corporations "organized exclusively for religious purposes".

N. Y. Judiciary Law, §546(1), granting exemption from jury duty to "a clergyman or minister of religion officiating as such and not following any other calling".

N. Y. Tax Law, §4(10), giving tax exemption to "the real property of a minister of the gospel or a priest of any denomination being an actual resident and inhabitant of this state, who is engaged in the work assigned to him by the church or the denomination to which he belongs".

All such provisions necessarily require some civil authority to determine what is a "recognized religious organization", or who is a "minister of religion", or what is a "recognized theological or divinity school". It has never been seriously claimed that the making of such a determination is an unconstitutional "censorship of religion". On the only occasion when it was claimed that the placing of such bodies or persons in special categories is an "establishment of religion", this Court unanimously rejected the claim as unworthy of serious consideration. **Selective Draft Law Cases**, 245 U. S. 366, 376, 389 (1918).

The question is not whether the specific form of released time now before this Court is the best that could be devised, or whether some particular regulation could or should be amended or omitted.

The questions that are here to be decided are only two.

The first question is this:

Whose civil liberties and whose free exercise of religion are really under attack,—the liberties and freedom of these two appellants, who claim no injury to themselves or their children, or the liberties and freedom of the hundreds of thousands of religious parents in New York State who wish to educate their own children according to their own consciences?

The second question is this:

Can these appellants, under color of the First Amendment, categorically forbid the State of New York to let a religious parent take his own child out of a New York public school at 2 P.M. on Wednesday for instruction in his own religious faith at a religious center chosen by himself and conducted by private teachers of his own choice?

If they can, the intention of the Founding Fathers now operates in reverse, and the Bill of Rights has become an engine of tyranny.

The judgment and order appealed from should be affirmed.

Respectfully submitted,

CHARLES H. TUTTLE,
*Attorney for The Greater New York
Coordinating Committee on Released
Time of Jews, Protestants and
Roman Catholics, Appellee.*

CHARLES H. TUTTLE
PORTER R. CHANDLER
LOUIS M. LOEB
Of Counsel

Appendix A

Opinion of Mr. Justice DiGiovanna, denying petitioners' motion for reargument

(N. Y. L. J., Wednesday, August 23, 1950, p. 299, col. 5)

"Matter of Zorach (Clauson)—This is a motion for a reargument of a motion heretofore decided by this court which sought to have declared unconstitutional the "released time" program for religious instruction now in effect in the public elementary schools of this city, and as an alternative request seeking the trial of issues allegedly raised by the petition and answering affidavits.

"Reargument is sought on two grounds. The first is that the court overlooked the binding effect of the opinion of Mr. Justice Black in *People ex rel. McCollum v. Board of Education* (333 U. S., 203). This court, it is true, quoted excerpts from the concurring opinion of Mr. Justice Frankfurter, who was one of the majority justices, as this court might properly do, to show the reasoning of various members of the court, and specifically to show a rational distinction between the Champaign plan there considered and the plan challenged herein. Furthermore, a court of concurrent jurisdiction in this state has spoken since the decision in the *McCollum* case upholding the constitutionality of a similar program (*Matter of Lewis v. Spaulding*, 193 Misc., 66, appeal withdrawn 299 N. Y. 564). Furthermore, the Court of Appeals of this state earlier upheld a similar plan in *People ex rel. Lewis v. Graves* (245 N. Y., 195). This court must reaffirm its determination of constitutionality on the basis of the above decisions and hold to its distinction between the New York and the Champaign plans.

"The second ground on which reargument is sought is that the court misinterpreted the factual theory of petitioners' proceeding. In support of this motion for reargument there have been submitted one conclusory affidavit of the attorney for the petitioners, one affidavit of a former

principal, four affidavits of *former* teachers, three affidavits from parents and three from former pupils. These affidavits outline what might be termed administrative difficulties.

o. "The moving papers on this motion have been duly considered by this court in arriving at its determination herein, even though such reargument must normally be based upon the papers submitted upon the original motion (*Hau-ser v. Herzog*, 141 App. Div., 522, 524; *Matter of Hooker*, 173 Misc., 515, 517).

"Reargument should not be granted unless it is shown that some question decisive of the case and duly submitted by counsel has been overlooked (*Mount v. Mitchell*, 32 N. Y., 702; *Fosdick v. Hempstead*, 126 N. Y., 651; *Matter of Palmer*, 193 Misc., 411). Nor may it be granted upon an additional showing of facts unless such facts occurred since the making of the original motion or permission to present such additional facts has been granted (*Haskell v. Moran*, 117 App. Div., 251, 252; *De Lacy v. Kelly*, 147 App. Div., 37, 38).

"Neither do the moving papers herein cite any contradictory decision of a higher court rendered subsequently to the decision of this court (*Hand v. Rogers*, 16 Misc., 364) nor that any controlling decision exists to which the attention of this court has not heretofore been called (*Coleman v. Livingston*, 45 How. Pr., 483).

"The moving papers herein show no valid reason for granting leave to reargue, but seem to be rather a plea to be allowed to renew the original motion upon additional facts not newly discovered.

"The motion for leave to reargue is denied."

Appendix B

Extracts from New York Education Law (McKinney's Consolidated Laws of New York, Volume 18, Part 1)

SECTION 3204

Instruction required

"1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction.

2. Quality and language of instruction; text-books. Instruction may be given only by a competent teacher. In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English. Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the eleven common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training and the history of New York state.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declara-

tion of Independence and established by the constitution of the United States.

b. For part time day schools. The course of study of a part time public day school shall include such subjects as will enlarge the civic and vocational intelligence and skill of the minors required to attend.

c. For evening schools. In a public evening school instruction shall be given in at least speaking, reading, and writing English.

d. For parental schools. In a parental school provision shall be made for vocational training and for instruction in other subjects appropriate to the minor's age and attainments.

e. Changes in courses of study. The state education department shall have power to alter the subjects of instruction as prescribed in this section.

4. Length of school sessions. a. A full time day school or class, except as otherwise prescribed, shall be in session for not less than one hundred ninety days each year, inclusive of legal holidays that occur during the term of said school and exclusive of Saturdays.

b. A part time day school or class shall be in session each year for at least four hours of each week during which the full time day schools are in session.

c. Evening schools shall be in session each year as follows:

(1) In cities having a population of one hundred thousand or more, on at least one hundred nights;

(2) In cities having a population of fifty thousand but less than one hundred thousand, on at least seventy-five nights;

(3) In each other city, and in each school district where twenty or more minors from seventeen to twenty-one years of age are required to attend upon evening instruction, on at least fifty nights.

5. Subject to rules and regulations of the board of regents, a pupil may be excused from such study of health and hygiene as conflicts with the religion of his parents or guardian. Such conflict must be certified by a proper representative of their religion as defined by section two of the religious corporations law."

Section 3205 prescribes that, with certain exceptions, attendance shall be compulsory from age 7 to age 16, and permits local boards of education in certain areas to raise the upper limit to age 17.

SECTION 3210

Amount and character of required attendance

"1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

2. Attendance elsewhere than at a public school. a. Hours of attendance. If a minor included by the provisions of part one of this article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.

b. Absence. Absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools. Absence for religious observance and education shall be per-

mitted under rules that the commissioner shall establish.

c. Holidays and vacations. Holidays and vacations shall not exceed in total amount and number those allowed by the public schools.

d. Exception. In applying the foregoing requirements a minor required to attend upon full time day instruction by the provisions of part one of this article may be permitted to attend for a shorter school day or for a shorter school year or for both, provided, in accordance with the regulations of the state education department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that required by the provisions of part one of this article.

e. Registration of certain private schools. No person or persons, firm or corporation, other than the public school authorities or an established religious group, shall establish or maintain a nursery school and/or kindergarten and/or elementary school giving instruction in the ten common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene and physical training, unless the school is registered under regulations of the commissioner. Upon complying with the said regulations and after payment of a fee of twenty-five dollars a certificate of registration shall be issued by the department which shall be valid for a period of two years from the date of issuance unless suspended or revoked within said period pursuant to said regulations. Such registration may be renewed biennially thereafter upon the payment of a renewal registration fee of twenty-five dollars."

Section 3211 requires the keeping of specified attendance records, whatever the place of education may be,—whether public or private.

Supreme Court of the United States Court, U. S.

October Term, 1951

No. 431

FILED

JAN 29 1952

CHARLES ELMORE CROPLEY
CLERK

TESSIM ZORACH and ESTA GLUCH,

*Appellants,**against*ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY
CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE and JAMES
MARSHALL, constituting The Board of Education of The
City of New York, and FRANCIS T. SPAULDING, Commis-
sioner of Education of the State of New York,*Appellees,*

and

THE GREATER NEW YORK COORDINATING COMMITTEE
ON RELEASED TIME OF JEWS, PROTESTANTS AND
ROMAN CATHOLICS,*Intervenor-Appellee,*

Appeal from the Court of Appeals of the State of New York

BRIEF OF APPELLEE, THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK

January 28, 1952

DENIS M. HURLEY

*Corporation Counsel of the City
of New York.**Attorney for Appellee, The Board of
Education of the City of New York*

MICHAEL A. CASTALDI,

*First Assistant Corporation Counsel
of the City of New York*

SEYMOUR B. QUEL,

DANIEL T. SCANNELL,

ARTHUR H. KAHN,

of Counsel

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
The Provisions of the Constitution and Statute Involved	3
The Questions Presented	4
Statement of the Case	5
(a) Released time regulations promulgated by The Commissioner of Education	6
(b) Released time rules adopted by The Board of Education of The City of New York	7
(c) The operation of the Released Time pro- gram in New York City	8
(d) Chief Characteristics of the Released Time Program in New York City	11
Summary of Argument	13
Argument:	
I The New York City released time program is different from the Champaign plan in- volved in the <i>McCullum</i> case in such vital respects as to render the New York plan immune from constitutional objection	14
II The released time program as operated in New York City does not violate the First and Fourteenth Amendments of the Con- stitution	21
III There are no triable issues of fact	43
Conclusion	46
Appendix:	
Education Law, §3204	48
Education Law, §3210	50

Table of Cases

	PAGE
Ackerman, Matter of, v. Kern, 256 App. Div. 626, 630 (1st Dept., 1939), affd. 281 N. Y. 87 (1939)	44
Atkin v. Kansas, 191 U. S. 207 (1903)	25
Bradfield v. Roberts, 175 U. S. 291 (1899)	31, 37
Chaplinsky v. New Hampshire, 315 U. S. 568 (1942)	38
Church of the Holy Trinity v. U. S., 143 U. S. 457 (1892)	32, 43
Cochran v. Louisiana, 281 U. S. 370 (1930)	31, 37, 40
Dofemus and Klein v. Board of Education of The Borough of Hawthorne and The State of New Jersey, 5 N. J. 435; 75 A. 2d 880 (1950)	33
Everson v. New Jersey, 330 U. S. 1 (1947)	3, 29, 31, 37, 40
Gitlow v. New York, 268 U. S. 652, 656 (1925)	23
Hamilton v. Regents, 293 U. S. 245 (1934)	38
Hines, Matter of, v. LaGuardia, 293 N. Y. 207, 215 (1944)	45
Jacobson v. Massachusetts, 197 U. S. 11 (1905)	36
Lewis, Matter of, v. Spaulding, 193 Misc. 66 (Sup. Ct., Albany Co., 1948), appeal withdrawn 299 N. Y. 564 (1949)	24
McCullum v. Board of Education, 333 U. S. 203 (1948)	3, 5, 14, 16, 18, 21, 23, 29, 33, 39, 41, 42, 45, 47
Meyer v. Nebraska, 262 U. S. 390 (1923)	27, 38
Morehead v. New York, 298 U. S. 587 (1936)	29

PAGE

People v. Friedman, 302 N. Y. 75 (1950), appeal dismissed 341 U. S. 907 (1951)	32, 33, 37, 39
People ex rel. Lewis v. Graves, 245 N. Y. 195 (1927)	5, 22, 23
People v. Pierson, 176 N. Y. 201 (1903)	36
Pierce v. Society of Sisters, 268 U. S. 510 (1925)	27, 29, 37
Prince v. Massachusetts, 321 U. S. 158 (1924)	27, 38
Reynolds v. United States, 98 U. S. 145 (1878)	38
Saia v. New York, 334 U. S. 558 (1948)	31
Snowden v. Hughes, 321 U. S. 1 (1944)	42, 45
Stewart v. Ahrens, 273 N. Y. 591 (1937)	46
Summers, In re, 325 U. S. 502 (1945)	38
West Virginia v. Barnette, 319 U. S. 624 (1943)	37
Winters v. New York, 333 U. S. 507, 514 (1948)	29
Yick Wo v. Hopkins, 118 U. S. 356 (1886)	42, 45

Constitutions, Statutes and Rules

PAGE

Article 78, N. Y. Civil Practice Act	1, 44
Education Law, §625 (renumbered §3210)	5, 24
Education Law, §3204	3, 48
Education Law, §3210	3, 24
Education Law, §3210, subd. 1b	2, 4, 5, 24
Federal Rules of Civil Procedure:	
Rule 12	44
Rule 56	44
New York Civil Practice Act, §§360-365	30
New York Civil Practice Act, §1291	43

	PAGE
New York Civil Practice Act, §1292	45
New York Civil Practice Act, §1296	2
New York General Construction Law, §24	30
New York Laws of 1940, ch. 305	5, 24
New York Penal Law, Art. 192	32
New York Rules of Civil Practice, Rule 113	44
New York Tax Law, §360, subd. 10	30
Released Time Regulations of the Commissioner of Education	6
Released Time Rules of Board of Education of City of New York	6, 42
Title 5, U. S. C., §16	30
Title 26, U. S. C., §101, subd. 6	30
Title 28, U. S. C., §453	30
Title 28, U. S. C., §1257	2
United States Constitution, Art. I, Sec. 7	32
United States Constitution, Amendment 1	2, 3, 4, 13, 21, 23, 37, 46
United States Constitution, Amendment 10	37
United States Constitution, Amendment 14	2, 3, 13, 21

Other Authorities

Moral & Spiritual Values in the Public Schools pub- lished by the Educational Policies Commission of the National Educational Association of the United States and the American Association of School Administrators, 1951	36
3rd Annual Report (1937), New York State Judicial Council, p. 186	44

Supreme Court of the United States

October Term, 1951

No. 431

TESSIM ZORACH and ESTA GLUCK,

Appellants,

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE and JAMES MARSHALL, constituting The Board of Education of The City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

Appellees,

and

THE GREATER NEW YORK COORDINATING COMMITTEE
ON RELEASED TIME OF JEWS, PROTESTANTS AND
ROMAN CATHOLICS,

Intervenor-Appellee.

**BRIEF OF APPELLEE, THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK**

Opinions Below

Appellants, in their capacity as citizens, taxpayers and parents of children in two of the public schools of the City of New York commenced this proceeding under Article 78 of the New York Civil Practice Act for an

order, in the nature of mandamus, compelling the appellees to perform a duty allegedly specifically enjoined by law,* that is, to rescind their respective regulations respecting the released time program in New York City. The basis for the relief was the asserted unconstitutionality of Education Law, §3210, subd. 1b which permits absence for religious observance and education under rules that the State Commissioner of Education shall establish.

The Supreme Court, Kings County (DiGIOVANNA, J.), upon consideration of the appellants' petition, the respective answers of the appellees with accompanying affidavits, the answer of the intervenor-appellee, and the appellants' reply papers, dismissed the petition on the merits as a matter of law (R. 6-10). The Court's opinion is reported in 198 Misc. 631 (R. 81-98).

The order of dismissal was affirmed by the Appellate Division of the Supreme Court (two Justices dissenting) 278 App. Div. 573 (R. 107-111) and by the Court of Appeals (one Judge dissenting) 303 N. Y. 161 (R. 114-141).

Jurisdiction

Appellants invoke the jurisdiction of this Court under Title 28 U. S. C. §1257, as an appeal from a final judgment of the highest Court of a State rejecting an attack on a State statute and rules and regulations established pursuant thereto claimed to be in conflict with the First and Fourteenth Amendments to the Federal Constitution. The decision of the Court of Appeals was rendered on July 11, 1951 (R. 114). This appeal was allowed by the Chief Judge of the Court of Appeals on September 24, 1951 (R. 145). On December 11, 1951 this Court noted probable jurisdiction (R. 154).

* New York Civil Practice Act, §1296.

The Provisions of the Constitution and Statute Involved

The First Amendment to the United States Constitution, so far as is material, provides: .

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * * ”

While this amendment refers specifically only to Congress, this Court has held that the prohibitions imposed upon Congress by the First Amendment constitute, by virtue of the Fourteenth Amendment, prohibitions against the States ~~on~~ those acting under color of State power. *Eversen v. New Jersey*, 330 U. S. 1 (1947); *McCullum v. Board of Education*, 333 U. S. 203 (1948).

New York Education Law, §3210 which is part of the Compulsory Education Law (Education Law, Article 65), so far as is material, provides:

“Amount and character of required attendance:

1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending. b. *Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.*” (Italics supplied.)

Although the full text of Section 3210 as well as Education Law, §3204, being also a part of the Compulsory Education Law, are set forth as an appendix to this brief (*infra*, pp. 48-51), we believe it would be well here to point out that Education Law, §3204 subd. 1 provides in part that a child required to attend upon instruction may attend the public school or elsewhere.

The Questions Presented

The practice of releasing children in the public schools at the request of their parents for one hour a week to receive religious education is popularly known as the released time program. The constitutional question presented is whether the New York released time statute (Education Law, §3210, subd. 1b) and the released time program as operated in the City of New York pursuant to the respective rules of the Commissioner of Education and of the local Board of Education contravene the First Amendment to the United States Constitution.

We state the proposition more generally. The New York City Board of Education is mindful of and obedient to the constitutional and statutory ban against sectarian teachings in the public schools. The Board of Education also recognizes the right of parents to direct the upbringing and education of their children. Is not the released time program here involved compatible with both the Constitution and the stated right of parents to direct the education of their children? Does such release of children stand on a footing different from the release of children for whole days at a time for religious observance? Is this minimal degree of cooperation between school and parents the only purpose of which is to foster and encourage the well rounded education of the child, to be condemned under the "establishment of religion" clause of the First Amendment merely because, as an incident thereto, religion generally or some sect in particular may also be involved? So long as the public schools are not used for denominational purposes are the States or local Boards of Education nevertheless to be denied the opportunity to experiment with various arrangements looking towards the solution of the dilemma of recognizing the need of religious training for our youth?

Statement of the Case

(1)

There is no dispute as to the material facts.

The petition in substance recites the basic statute and regulations under which the New York released time program operates, and asserts their illegality and unconstitutionality on divers grounds which we shall hereinafter discuss.

The Board of Education's answer and accompanying affidavits set forth the Board's regulations as well as those of the Commissioner of Education under which the released time program operates in the City of New York, and such other facts as demonstrate that the New York City released time program is so different from the Champaign plan involved in the *McCollum* case (*McCollum v. Board of Education*, 383 U. S. 203 [1948]), and so completely free from the features condemned by this Court in the *McCollum* case, as to render the New York plan immune from any constitutional objections.

(2)

The constitutionality of a released time program substantially similar to the one under attack here was sustained by the New York Court of Appeals in 1927. *People ex rel. Lewis v. Graves*, 245 N. Y. 195.

Following that case the Legislature enacted L. 1940, ch. 305 (hereinafter referred to as the released time statute), which amended Education Law, §625 (renumbered §3210), by adding thereto as subd. 1b, the following sentence:

"Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

**Released Time Regulations Promulgated by the
Commissioner of Education**

In pursuance of the released time statute the Commissioner of Education, on July 4, 1940, issued the following regulations which are still in force and effect (R. 29-30):

- “1. Absence of a pupil from school during hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil.
2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.
3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.
4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.
5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.
6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools.”

Released Time Rules Adopted by the Board of Education of the City of New York

In compliance with the released time statute and the regulations of the Commissioner of Education, the Board of Education of the City of New York, on November 13, 1940, adopted the following rules to govern the operation of the released time program in New York City (R. 30-32):

1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.
2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.
3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.
4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week, except that

in classes on a departmental schedule release will be limited to the last period of the program.

5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.
6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

The foregoing rules have been continued in effect without change except Rule No. 4 which was amended by the Board of Education on September 24, 1941, to read as follows:

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

"The Operation of the Released Time Program in New York City

In his affidavit in support of the answer interposed herein on behalf of the Board of Education of the City of New York, Superintendent of Schools William Jansen describes the operation of the released time program in New York City. He states (R. 32-34):

"The parent who desires to have his child released for religious instruction signs a card in the form substantially as follows:

REGISTRATION FOR RELEASED TIME RELIGIOUS
INSTRUCTION

New York City

194

To Principal of School

Please excuse my child,
of grade one hour weekly on

..... throughout the rest of this school
year, beginning to go for

religious instruction at

(Name of Center to which child is to go)

(a)

(Signature of parent or guardian)

Address

Phone

(b) Provision has been made to accommodate and
instruct this pupil

(Signature of Clergyman)

(Card to be retained and filed by the
Public School)

RS-1

Such registration cards are prepared and distributed either by 'The Greater New York Coordinating Committee on Released Time', a committee wholly independent of our city schools, or by the particular religious organization conducting the religious instruction. Neither the Board of Education nor its school principals, teachers, or other employees participate in any way in the distribution of such cards. Further-

more, the distribution of the cards is not permitted within the public schools. The preparation or printing of the cards involves no expense on the part of the Board of Education of the City of New York. When the card is received by the principal of the school, the principal notifies the teacher of the class wherein the pupil named in the card is enrolled, that such pupil is to be released at 2:00 p.m. on the day designated for religious instruction in that borough. At the appointed time—2:00 p.m.—without further announcement by the teacher in the classroom the child leaves the class and the school grounds and proceeds for religious instruction to the location specified by the religious organization. The dismissal of those pupils who participate in the released time program is effected in the same manner as the normal dismissal of pupils at the close of the school day.

The rules of the Board of Education provide that the religious organization is to notify the school principal each week of the attendance or absence of pupils upon religious instruction. In the event that a pupil is absent from religious instruction three times, the religious organization requires the parent to revoke the permission for the release of such pupil. Thus, the responsibility for the pupils' attendance upon their religious instruction is assumed solely by the religious organizations in cooperation with the parents.

The registration cards are not available or used by the school authorities for any purpose other than as a record of pupils entitled to be excused."

**Chief Characteristics of the Released Time
Program in New York City**

Superintendent Jansen summarizes the chief characteristics of the released time program in New York City as follows (R. 35-36):

"(a) The religious instruction is given outside the school buildings and grounds.

(b) The released time program is entirely permissive and voluntary. The pupil is excused for religious instruction only upon the joint written request of his parent or guardian and the particular religious organization.

(c) The absence of the pupil is limited to one hour a week, such hour to be the last hour of the school session. All the pupils of all religious faiths participating in the released time program are excused at the same time on the same day in the particular borough.

(d) The released time program is open to any religious organization, in cooperation with the parents of the pupils concerned, who desire to participate therein.

(e) The religious organizations, in cooperation with the parents, assume full responsibility for attendance at the religious center and for the program of religious instruction thereat.

(f) The released pupils are dismissed from school in the usual way as in the case of other permitted absences.

(g) The school authorities have no responsibility beyond that assumed in regular dismissals.

(h) The parent's written request for the excuse of the child is filed with the school and is not available or used for any other purpose.

(i) The religious organization files with the school principal a card attendance record for each pupil excused from the school pursuant to the parent's request.

(j) There is *no comment* by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction.

(k) The planning necessary to accommodate pupils on released time is no greater than or different from that required when large numbers of pupils are absent in the schools of the City of New York for the purpose of observing religious holidays or by reason of inclement weather or serious illness in any particular community.

(l) The operation of the released time program entails no expenditure of public moneys."

Summary of Argument

I

The New York City released time program is different from the Champaign plan involved in the *McColum* case in such vital respects as to render the New York plan immune from constitutional objection.

- (1) Released Time, *per se*, is not unconstitutional.
- (2) The Champaign Plan for Released Time
- (3) Distinguishing Characteristics of the Champaign Plan and the New York City Plan

II

The released time program as operated in New York City does not violate the First and Fourteenth Amendments of the Constitution.

- (1) The New York adjudications on released time
- (2) The New York statute authorizing released time
- (3) The "wall of separation between Church and State"
- (4) The "wall of separation" is a relative concept
- (5) The educational justification for released time
- (6) The New York released time program strikes a proper accommodation or balance between the First Amendment prohibition against the "establishment of religion" and the Tenth Amendment reservation of power to the people.
- (7) The alleged "divisiveness" of the program

III

There are no triable issues of fact.

POINT I

The New York City released time program is different from the Champaign plan involved in the *McCollum* case in such vital respects as to render the New York plan immune from constitutional objection.

(1)

Released Time, *per se*, is not unconstitutional.

The appellants contend that the New York City released time program has been outlawed by the decision of this Court in the *McCollum* case, 333 U. S. 203 (1948). We confidently assert that no such result was intended by this Court. From a reading of the several opinions in the *McCollum* case, it becomes readily apparent that the constitutionality of a released time program is to be tested by a consideration of the particular program under scrutiny. Certainly, this was the view expressed by Mr. Justice FRANKFURTER in his concurring opinion when he said (p. 225):

"Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some 'released time' classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to

protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court.

The substantial differences among arrangements lumped together as 'released time' emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. . . .

And further. (p. 231):

"We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable."

It may be noted that Justices JACKSON, RUTLEDGE and BURTON joined in the concurring opinion of Mr. Justice FRANKFURTER.

And, in a separate concurring opinion, Mr. Justice JACKSON stated (p. 237):

"The opinions in this case show that public educational authorities have evolved a considerable variety of practices in dealing with the religious problem. Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice pre-

vails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error. " " "

In a dissenting opinion, Mr. Justice REED held that even the "Champaign Plan" for released time was free from constitutional objection.

Thus four justices of the United States Supreme Court held that all released time programs as a "generalized conception" are not unconstitutional; one justice held that a released time program, even though attended by the characteristics of the Champaign plan, would not be violative of the principle of separation of church and state. It is, therefore, evident that of the then justices of the United States Supreme Court, at least five of the justices comprising the then majority of the Court, declared that released time programs are not *per se* unconstitutional. Rather, there must be a detailed analysis of the particular released time program under consideration before the constitutional test can be applied.

The appellants' case is predicated almost entirely upon a few isolated phrases contained in the opinion of Mr. Justice BLACK writing for the majority of the Court. But it is plain from a reading of the entire opinion of Mr. Justice BLACK that even he had no intention of passing in blanket terms upon the abstract issue of released time in general. On the contrary, his opinion dealt in painstaking detail with the particular facts of the particular program in force in the City of Champaign. It was to those facts and to that program that his opinion was directed.

Our view, therefore, is that the decision in the *McCollum* case must be considered only in the light of the factual aspects of the Champaign plan.

The Champaign Plan for Released Time

As an aid to the Court, we quote Mr. Justice FRANKFURTER's summary of the facts with respect to the method of operation of the Champaign released time plan (p. 226):

"Public school teachers distribute to their pupils cards supplied by church groups, so that the parents may indicate whether they desire religious instruction for their children. For those desiring it, religious classes are conducted in the regular classrooms of the public schools by teachers of religion paid by the churches and appointed by them, but, as the State court found, 'subject to the approval and supervision of the Superintendent.' The courses do not profess to give secular instruction in subjects concerning religion. Their candid purpose is sectarian teaching. While a child can go to any of the religious classes offered, a particular sect wishing a teacher for its devotees requires the permission of the school superintendent 'who in turn will determine whether or not it is practical for said group to teach in said school system.' If no provision is made for religious instruction in the particular faith of a child, or if for other reasons the child is not enrolled in any of the offered classes, he is required to attend a regular school class, or a study period during which he is often left to his own devices. Reports of attendance in the religious classes are submitted by the religious instructor to the school authorities, and the child who fails to attend is presumably deemed a truant."

To the foregoing may be added an additional element involved in the Champaign plan whereby the school children participating in the released time program were segregated by the school authorities in separate school

rooms according to the respective religious faiths of the pupils. Counsel for the appellant in the *McCollum* case, in his brief on appeal to this Court, summarizes the evidence in the record of that case with respect to the segregation of the pupils as follows:

"All students in the elementary classes were classified, and the several groups were segregated by the school authorities. Separate rooms were provided for Protestants, Catholics and Jews (Transcript, 105, 150, 229), although there has been no Jewish instruction for several years (Transcript, 224, 229). The Protestant group being dominant in number, the regular class rooms were usually employed for their religious teaching during what were otherwise public school class hours, with the public school teacher remaining in the room during the religious instruction (Transcript, 92, 133, 137). The Catholics were assigned other rooms (Transcript, 150). Those in the elementary grades who did not take religious education remained in their class rooms if those taking religious education went elsewhere (Transcript, 147, 249); otherwise they went elsewhere (Transcript, 248). The son of the appellant in this case was once sent to sit alone in the corridor (Transcript, 132)."

(3)

Distinguishing Characteristics of the Champaign Plan and the New York City Plan

We have set forth, *supra*, pages 11-12, a summary of the chief characteristics of the New York City plan. That the New York City plan for released time differs in "crucial respects" from the Champaign plan is evident from the factual analysis made of each plan by the Superintendent of Schools of the City of New York. Dr. Jansen's comparative analysis, which is outlined in his

affidavit in support of the Board's answer herein, is reproduced below (R. 37-38):

Champaign Plan

New York City Plan

- | | |
|--|---|
| <ol style="list-style-type: none"> 1. No underlying enabling State statute. 2. Religious training took place in the school buildings and on school property. 3. The place for instruction was designated by school officials. 4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils. 5. School officials supervised and approved the religious teacher. | <ol style="list-style-type: none"> 1. Education Law §3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish". 2. Religious training takes place outside of the school buildings and off school property. 3. The place for instruction is designated by the religious organization in cooperation with the parent. 4. No element of segregation is present. 5. No supervision or approval of religious teachers of course of instruction by school officials. |
|--|---|

Champaign Plan

6. Pupils were solicited in school buildings for religious instruction.
7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds.
8. Non-attending pupils isolated or removed to another room.

New York City Plan

6. School officials do not solicit or recruit pupils for religious instruction.
7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved.
8. Non-attending pupils stay in their regular classrooms continuing significant educational work.
9. No credit given for attendance at the religious classes.
10. No compulsion by school authorities with respect to attendance or truancy.
11. No promotion or publicizing of the released time program by school officials.
12. No public moneys are used.

We believe that the foregoing comparison demonstrates that the unconstitutional aspects of the Champaign plan do not exist in the New York plan.

As pointed out by Judge FROESSEL of the New York Court of Appeals in upholding the constitutionality of the released time program involved in the case at bar (303 N. Y. at p. 169):

"In the instant case, there is no 'use' of tax supported 'property or credit or any public money' 'directly or

indirectly' 'in aid or maintenance' of religious instruction * * * and there is no such co-operation as in the *McCollum* case (*supra*) between the school authorities and the religious committee in promoting religious education."

The prop of the appellants' case is the *McCollum* decision. But we believe we have shown that the *McCollum* decision is bereft of any weight or support for the position taken by the appellants in this case. We suggest that if any released time program is to wear the mantle of constitutional blessing, certainly it is the New York City program which is devoid of the features condemned by this Court in the *McCollum* case.

POINT II

The released time program as operated in New York City does not violate the First and Fourteenth Amendments of the Constitution.

(1)

The New York adjudications on released time

The appellants assert that the New York released time program is in violation of the First and Fourteenth Amendments of the Constitution of the United States. Simply stated, the appellants' argument is that in no event may school children be excused for one hour a week to attend upon religious instruction. This, they say, is unconstitutional, pointing to the decision of this Court in the *McCollum* case. We deem it unnecessary to argue further that the New York City released time program is so crucially different from the Champaign plan that the *McCollum* decision cannot aid the appellants.

In 1926, a proceeding against the Commissioner of Education of the State of New York was instituted

wherein the legality and constitutionality of a released time program as then operated in the City of White Plains was challenged. As pointed out by JUDGE FROESSEL, writing for the majority in the New York Court of Appeals in the instant case, the released time program there under attack, except for the absence of a State enabling act, was essentially the same program that is in operation today in the City of New York. The petitioner's contention that the White Plains program was unconstitutional in that it violated the principle of separation of Church and State was successively rejected at Special Term, the Appellate Division and the Court of Appeals. *People ex rel. Lewis v. Graves*, 127 Misc. 135 (Sup. Ct. Albany Co., 1926), aff'd 219 App. Div. 233 (3rd Dept., 1927), aff'd 245 N. Y. 195 (1927).

Judge POUND of the New York Court of Appeals, writing for a unanimous court, its other distinguished members having been Chief Judge Cardozo, and Judges Crane, Andrews, Lehman, Kellogg and O'Brien there said (pp. 198-199):

"A child otherwise regular in attendance may be excused for a portion of the entire time during which the schools are in session, to the extent at least of half an hour in each week, to take outside instruction in music or dancing without violating the provisions of the Compulsory Education Law, either in letter or spirit. Otherwise the word 'regularly' as used in the statute would be superfluous. Practical administration of the public schools calls for some elasticity in this regard and vests some discretion in the school authorities. Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support. As a matter of educational policy, the Commissioner doubtless may make proper regulations to restrict the local authorities when the administration of the plan of week-day instruction in religion or

any plan of outside instruction in lay subjects in his judgment interferes unduly with the regular work of the school.

The separation of the public school system from religious denominational instruction is thus complete. Jealous sectaries may view with alarm the introduction in the schools of religious teaching which to the unobservant eye is but faintly tinted with denominationalism. Eternal vigilance is the price of constitutional rights. But it is impossible to say, as matter of law, that the slightest infringement of constitutional right or abuse of statutory requirement has been shown in this case."

Two years before the decision of the New York Court of Appeals in the *Lewis* case this Court had "assumed" that the First Amendment has been made applicable to the States by virtue of the due process clause of the Fourteenth Amendment (*Gillow v. New York*, 268 U. S. 652, 666 [1925]). Lewis, in his petition, had urged the unconstitutionality of the released time program under "the constitutional guarantees of the New York State and the United States Constitutions respecting religious liberty and the separation of church and state." Nevertheless, the New York Court of Appeals in that case as well as in the instant case held that the released time program did not breach the "wall of separation" between church and state.

Parenthetically, it may be added that no sooner had this Court handed down its *McCollum* decision than the self same Lewis, who had been unsuccessful in 1927 in his efforts to strike down the City of White Plains released time program again came to the fore. He, like the appellants here, sought to have the New York courts declare the New York City released time program unconstitutional by reason of the *McCollum* decision. In the record of that proceeding, as in the case at bar, the Board of Education

fully set forth the factual operation of the New York released time program. Again Mr. Lewis was rebuffed. The Court found the New York plan to be so dissimilar from the *Champaign* plan as to be free from constitutional objection. *Matter of Lewis v. Spaulding*, 193 Misc. 66 (Sup. Ct., Albany Co., 1948), appeal withdrawn, 299 N. Y. 564 (1949).

(2)

The New York statute authorizing released time

The first *Lewis* case was followed by the enactment of New York Laws of 1940, ch. 305, which amended Education Law, §625 (renumbered §3210) by adding thereto, as subd. 1b the following sentence:

“Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.”

Thus the Legislature evidenced its approval of the decisions by the Courts in the *Lewis* case, and sanctioned the existing practice of released time on a state-wide basis.

In approving and signing the released time statute, Governor Lehman (now Senator) said (R. 27-29):

“Under this bill the State Commissioner of Education shall establish rules under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education.”

For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws.

In so holding the Court of Appeals pointed out: 'Neither the Constitution or the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.'

However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agency of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules.

A few people have given voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

With particular reference to the statute under consideration it would not be amiss to point out the rule, well grounded in constitutional law, that statutes enjoy a presumption of constitutionality. Indeed, it is only when a statute is palpably unconstitutional that a court will so adjudicate. The reason for the rule is that the courts will not be quick to frustrate the will of the people. In *Atkin v. Kansas*, 191 U. S. 207 (1903), this Court said (p. 223):

"But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

(3)

The "wall of separation between Church and State"

The appellants argue that the New York released time program is unconstitutional in that it violates the principle of separation between church and state. Taking refuge behind the "wall of separation between Church and State," and disregarding any attempt to define just where the "wall" is to be built, the appellants argue that this "wall" is a constitutional barrier to the operation of the New York released time program. We disavow any attempt to move or tear down the "wall." The released time program as operated in the City of New York renders the "wall" nonetheless "high and impregnable." In the administration of the public schools of the City the principle of separation between church and state is ever maintained with commensurate recognition that a parent has the basic constitutional right to direct the educational training and nurture of his child. We quote from the affidavit herein of William Jansen, Superintendent of Schools of the City of New York (R. 39):

"In the administration of our public schools the Board of Education recognizes that such schools are non-sectarian and the instruction therein is confined to the secular. However, we also recognize the right inherent in a parent to direct the training and nurture of his child and that the child is not the mere creature of the state. The 'released time program' as operated in the City of New York does nothing more and nothing less than to recognize such fundamental rights and principles. The secular instruction and the religious instruction are kept within their respective spheres. The principle of separation of church and state is thus kept inviolate."

The quoted statement of Dr. Jansen is consonant with the views expressed by this Court in *Pierce v. Society of*

Sisters, 268 U. S. 310 (1925). In that case, this Court declared unconstitutional an Oregon statute which would have confined the education of every child to secular instruction, thus, in effect, outlawing the parochial school system. In enunciating and reaffirming the principle that parents and guardians alike possess the fundamental liberty "to direct the upbringing and education of children under their control," this Court said (at p. 535):

"The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

In *Prince v. Massachusetts*, 321 U. S. 158 (1944), this Court again declared (p. 166):

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

This Court espoused the same principle in *Meyer v. Nebraska*, 262 U. S. 390 (1923).

From the *Pierce* case, we deduce the principle that if a parent has the right to have his child receive full time instruction in the parochial schools, it follows as a necessary corollary that the parent has the right to have his child receive part time instruction in the public schools and part time instruction in the parochial schools. Thus, if we consider that full time instruction in the public schools comprises 25 hours a week, and a child can be excused from attendance in the public schools for the full

25 hours a week on condition that he attend instruction elsewhere, it would follow quite logically that the child may be excused from attendance in the public schools for 1/25th of the 25 hour school week for the purpose of attending some other recognized place of instruction.

The released time program carries out this principle to the letter. A child participating in the New York released time program attends the secular school for 24 hours of the 25-hour school week, and upon the parent's request the child attends at religious instruction for the remaining hour, or 1/25th of the school week.

Dr. Pertsch, an Associate Superintendent of Schools, sums up the situation quite effectively when he states (R. 45):

"The instructional machinery of our city schools is so geared as to comply in all respects with the provisions of the 'compulsory education law.' Such compliance is unaffected by the excused absence of pupils for one hour per week for the purpose of attending upon religious instruction. Those pupils who remain in school when others are released for religious instruction are given significant education work with emphasis on individual and remedial instruction. The pupils who are released are given comparable instruction, as the opportunity may present itself, at other times during the school week. In any event, the requirements of the 'compulsory education law' are fully observed and administered alike to all pupils both as to 'required attendance' and as to imparting instruction in the subjects mandated by Education Law, §3204, subd. 3."

Under well established principles, the holding of the highest Court of the State of New York in construing the Compulsory Education Law to be consistent with the New York City plan of released time is binding on this

Court. *Winters v. New York*, 333 U. S. 507, 514 (1948); *Morehead v. New York*, 298 U. S. 587 (1936).

In our view the released time program before this Court cannot be said to breach the wall of separation between Church and State one whit more than the existence of a parochial school system, as sustained in the *Pierce* case. The Board of Education has done no more than give effect to the parent's request that his child be released from school one hour each week for religious instruction which the child cannot receive in the public school.

(4)

The "wall of separation" is a relative concept

We are not unmindful that, in referring to the breadth and scope of the First Amendment, some of the Justices of this Court in the *Everson* case (330 U. S. at pp. 15-16) and in the *McCullum* case (333 U. S. at pp. 210-211) stated:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions; whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"

This is a far cry from supporting the argument now advanced by the opponents of released time. The metaphorical concept embodied in the expression "wall of separation between church and State" must be evaluated, we insist, with regard to the precise factual situation in each particular case and cannot be applied indiscriminately and as an absolute.

The unmitigated unthinking of our opponents in urging the elevation of the metaphor to an absolute is to argue in a vacuum and leads to absurdity.

Moreover, the unrestricted, unlimited and unreasoned acceptance of the metaphor would fly in the face of our national tradition and give rise to all sorts of illogical and incongruous results. For example, it would be unlawful for Congress to appropriate moneys for the payment of salaries to the Chaplains in our Armed Forces or to those who, from earliest times, have opened each session of the Congress with prayer. Religious services at public hospitals to comfort the sick and dying and in penal institutions to give spiritual aid to the imprisoned and solace to the condemned would be banned. The New York State and United States provisions for the form of an oath, thereby invoking moral sanctions for the proper administration of justice and the machinery of government, would be unconstitutional. (New York Civil Practice Act, §§360-365; 5 U. S. C. 16*; 28 U. S. C. 453.) Tax exemption for religious institutions and tax deductions for contributions to religious organizations would be invalid (26 U. S. C. 101 subd. 6; New York Tax Law, §360 subd. 10). Invoking of the Deity in Thanksgiving proclamations or to assist our Armed Forces would be stopped. Reference to our trust in God would have to be eliminated from our coins. The Constitution of the State of New York

* The oath prescribed by 5 U.S.C. 16 for any person elected or appointed to any office of honor or profit either in the civil, military or naval service, except the President of the United States, is as follows: "I, AB. do solemnly swear (or affirm) that I will support and defend the Constitution of the United States * * *. So help me God."

would in itself be unconstitutional at the point in its preamble where it expresses gratitude to an "Almighty God" for our freedom. Laws making Christmas and Sunday legal holidays would be bad (New York General Construction Law, §24). Laws providing for the incorporation of ecclesiastical bodies would have to be stricken out. Denominational colleges would be barred from receiving students under the "G.I. Bill of Rights." Religious groups would be barred from holding meetings in public parks. But see *Saia v. New York*, 334 U. S. 558 (1948). Public school children would be barred from singing "America", part of which is a prayer to God to "protect us by Thy might," "God Bless America" and so much of "America the Beautiful" which recites:

"God shed his grace on thee and crown thy good with brotherhood."

That such illogical results were not contemplated by this Court in its definition of the meaning of the First Amendment is clear from the holding in the *Everson* case in which this Court first referred to the wall separating Church and State, see *supra*, p. 29. In the *Everson* case this Court sustained the power of a local school board to pay the transportation charges of children attending a Catholic parochial school. Can it be denied that the religious school thereby received an indirect or incidental benefit?

Furthermore, this Court did not overrule either *Cochran v. Louisiana*, 281 U. S. 370 (1930) or *Bradfield v. Roberts*, 175 U. S. 291 (1899). In the *Cochran* case this Court sustained the State's purchase of textbooks for all school children including those attending parochial schools. And in the *Bradfield* case an appropriation to a Catholic hospital was sustained.

Nor has this Court ever overruled its earlier statement that ours is a religious nation and that the stability of our government rests upon the basis of a belief in God.

Church of the Holy Trinity v. U. S., 143 U. S. 457 (1892). And in *People v. Friedman*, 302 N. Y. 75 (1950), appeal dismissed for want of a substantial Federal question 341 U. S. 907 (1951); this Court refused to entertain an appeal from a ruling of the New York Court of Appeals that the New York Sunday Laws (Penal Law, Art. 192) were constitutional in the face of an attack that they violated the "establishment of religion" clause of the First Amendment.

We regard with particular significance the following statement in the *Everson* case made by Mr. Justice BLACK (330 U. S. at p. 18):

"State power is no more to be used to handicap religions than it is to favor them."

Can it be denied that the appellants seek to "handicap religions" when they say, in effect, "you must deny the parents' request and refuse to excuse school children for one hour a week for religious instruction." Are not the appellants seeking to stifle that very freedom of religion guaranteed to us by the Constitution?

Separation of Church and State is a relative concept. There is no such thing as a completely free church in a free state or a state without religious influences. Our churches must be built in accordance with our building codes and fire laws and indeed their legal incorporation is regulated by State law. On the other hand, the State has repeatedly availed itself of religion by invoking the moral sanctions of oaths, in looking to God as the creator of our "inalienable rights" (The Declaration of Independence) and in the many other ways previously alluded to which make up the warp and woof of our American way of life. Indeed the Constitution itself recognizes Sunday as a non-business day. *U. S. Const. Art. I, Sec. 7*. cf. *People v. Friedman*, 302 N. Y. 75 (1950), appeal dismissed for want of a substantial Federal question, 341 U. S. 907 (1951).

In *People v. Friedman, supra*, the New York Court of Appeals, in sustaining the constitutionality of the "Sunday laws" and in rejecting an attack that they violated the First Amendment, recognized that they may be said to have had a religious origin but that they since have come to serve a proper State purpose of providing for a regular day of rest. In upholding the Sunday laws, the Court said (302 N. Y. at p. 79):

"It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion."

The Supreme Court of New Jersey in the "bible reading case", *Doremus and Klein v. Board of Education of the Borough of Hawthorne and the State of New Jersey*, 5 N. J. 435; 75 A. 2d 880 (Oct. 16, 1950), appeal pending in this Court, sustained the constitutionality of reading a portion of the old testament and the recitation of the Lord's prayer in the public schools. The Court, in rejecting the applicability of the *McCullum* decision, stated (75 A. 2d at p. 886):

"Cooley (Constitutional Limitations, Eighth Edition, Vol. 2, p. 966) lists five things which are not lawful under any of the American constitutions, namely, (1) any law respecting an establishment of religion, (2) compulsory support, by taxation or otherwise, of religious instruction, (3) compulsory attendance upon religious worship, (4) restraints upon the free exercise of religion according to the dictates of the conscience, (5) restraints upon the expression of religious belief. But, he adds (p. 974), 'while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain

no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper infinite (sic) and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws."

The rule which evolves from an analysis of the several cases in this and other Courts and our national tradition would seem to require a recognition of the distinction between religion as a functional experience of mankind and religion as institutionalized by various churches and sects, between religion *per se* and sectarianism, between a recognition of our Judaeo-Christian culture and tradition and the dogma, creed, tenets and doctrines of the separate faiths.

(5)

The educational justification for released time

Family life in America today has been falling apart in a manner approaching a debacle. The alarming divorce rate is one symptom. The dislocations caused by World War II, the Cold War and the Hot War are undoubtedly contributing causes. Modern city living in apartments, not homesteads, differences in family interests and occupations and leisure time activities, increasing individualism and selfishness in the home as manifested by an insistence on one's rights and not on one's duties or obligations have all contributed to the disease. Economic pressures compelling mothers to work have also left their

mark. As a consequence, whether we like it or not, many of our children and youth have no stabilizing recollection of normal happy home life.

The released time program is one effort to bring a stabilizing influence into the lives of children. The educational authorities in making available one hour a week for religious education outside of the school are attempting to discharge their duty to their students of providing a well rounded and properly grounded education. They are trying to do this within the framework of our constitutional system which bars sectarian religious instruction in the schools.

Dr. Jansen justifies the released time program as a proper educational experience for the children who participate in these words (R. 39):

"The view is widely shared among educators that since religion has to do with the highest values and aspirations of man it must play an essential role in education. From the mental hygiene point of view, it is important that children grow up in the security of those basic spiritual values which are woven into their cultural heritage. A sound religious education helps the individual to withstand conflicting stresses within the personality, to develop self-respect and true humility, to define values, to accept goals beyond immediate personal satisfaction, to make sacrifices for the general good, and to be truly tolerant of other races and religions. All of these qualities are essential to a well integrated personality."

It is no argument against released time to say that sectarian religions are thereby aided. That is not the dominant or direct purpose of the program. The purpose is to give the child the opportunity to receive what it is impossible for the schools to give. We state the proposition more specifically. The New York released time pro-

gram is not in "aid" of religion. Rather, it complements the *secular* program of education.

In hundreds of ways the State in general and the schools in particular are daily called upon to compensate for the deficiencies of home life and the neglect of parents. *Jacobson v. Massachusetts*, 197 U. S. 11 (1905); *People v. Pierson*, 176 N. Y. 201 (1903).

Giving youth an appreciation of fundamental moral and spiritual values, concededly a proper educational purpose,* may be said to aid religion by providing the apprehensive basis upon which religions may build in furtherance of their own programs. Would appellants, in logical progression, urge that such instruction is banned by the First Amendment?

Today there is an unquestioned need for a moral regeneration whether it comes through religious training or some other means. It is not proposed that the schools provide religious training—but why may not the parents, through their representatives sitting as the Legislature and as the Board of Education, devise a program whereby parents may request the schools to at least make possible the doing of an act for which there is a public need? Thus the released-time program makes possible the correction of a cultural defect now existing in many American homes, a defect with which the schools themselves are powerless to deal.

In this program there is no teaching of religion in the public schools. In releasing children for only one hour a week to enable the child to receive religious instruction the school is but rounding out its educational tasks. An educated person cannot be religiously illiterate.

* *Moral and Spiritual Values in the Public Schools*, Educational Policies Commission of the National Education Association of the United States and the American Association of School Administrators, 1951.

(6)

The New York released time program strikes a proper accommodation or balance between the First Amendment prohibition against the "establishment of religion" and the Tenth Amendment reservation of power to the people.

An accommodation must be struck between the First Amendment prohibition against the "establishment of religion" and the Tenth Amendment reservation of power to the people. Such reservation of power has been manifested in this case by the New York Legislature and the local Board of Education in providing for a released time program, since it has been demonstrated that such program serves a proper educational purpose. That such program may be said indirectly or incidentally to involve religion in some degree or coincide with the desires of religious leaders, is immaterial from a constitutional point of view. Illustrations of other situations going so far as to confer some incidental benefit to religion but which have been found to be constitutionally unobjectionable are *Eversen v. Board of Education*, 330 U. S. 1 (1947); *Cochran v. Louisiana*, 281 U. S. 370 (1930); *Bradfield v. Roberts*, 175 U. S. 291 (1899); *People v. Friedman*, 302 N. Y. 75 (1950), appeal dismissed, 341 U. S. 907 (1951).

If we approach the problem of the true meaning of the First Amendment with respect to its guarantee of religious liberty, "or prohibiting the free exercise thereof [religion]", we come to the same conclusion—namely, that a reconciliation or accommodation of conflicting rights must be made. This, of course, is always a delicate matter.

Thus, in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925) the State's attempt to compel all children to attend at the public schools had to give way to the parent's paramount right to educate his child in accordance with the parent's religious beliefs. In *West Virginia v. Barnette*, 319 U. S. 624 (1943); so much of the State's attempt to compel all children to salute the flag had to give way to

the religious convictions of some children that saluting the flag was a form of worship to a graven image contrary to their religious beliefs. In *Meyer v. Nebraska*, 262 U. S. 390 (1923), a State's attempt to have only English taught in all schools had to give way to the parent's right to have his children educated in other languages.

But in *Reynolds v. United States*, 98 U. S. 145 (1878), the individual's religious belief in polygamy had to give way to the State's ban on bigamy. In *Prince v. Massachusetts*, 321 U. S. 458 (1944), the individual's belief that his religion compelled his children to go on the public highways to propagandize their religion had to give way to the State's law prohibiting child labor. A person's religious scruples constituted no exemption from the State's requirement to bear arms or compulsory military training, *In re Summers*, 325 U. S. 561 (1945); *Hamilton v. Regents*, 293 U. S. 245 (1934). See also *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942).

From an analysis of the above cases we deduce the principle that a delicate accommodation must be arrived at in each case with due weight being given to the individual's right to freedom of religious expression on the one hand and the State's duty to all citizens of providing for their mutual health, safety, morals and general welfare. Stated in another way, the State's effort to provide for the general welfare, safety and morals of its citizens will not be struck down where as an *incident* to such program religion or a religion is indirectly a factor. To what extent religion is but an *incident* in the latter cases, or in what direction the scales of accommodation are to be tipped in the former cases, is a matter to be decided in each particular case, due regard being given to all the relevant facts and circumstances.

In many spheres the interests of the State and of religion coincide.

Instances of the concededly valid exercise of State power which happen to coincide with the desires of re-

ligious leaders readily come to mind. That most religions sanctify marriage does not mean that the State cannot also make laws looking toward the permanency of the marriage ties. That Sunday is considered the Sabbath does not bar the State from making Sunday a day of rest. *People v. Friedman, supra.*

In the *McCollum* case, Mr. Justice JACKSON warned against giving unrestricted scope to the Court's opinion without laying down some limitations. At pages 235-236 he said:

"If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics or chemistry are, or can be, completely secularized. But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than in forthright sermon. Even such a 'science' as biology raises the issue between evolution and creation as an explana-

tion of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for a wordly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.

But how one can teach, with satisfaction or even with justice to all faiths, such subjects as the story of the Reformation, the Inquisition, or even the New England effort to found 'a Church without a Bishop and a State without a King,' is more than I know. It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects such as Confucius or Mohammed. When instruction turns to proselyting and imparting knowledge becomes evangelism is, except in the crudest cases, a subtle inquiry."

With special reference to the case at bar, we believe that it has been amply demonstrated that the released time program serves a public and educational need. The fact that such program coincides with the desires of religious leaders and of the parents of children voluntarily availing themselves of the released time program is an inadequate reason for striking it down. See *Everson v. New Jersey*, *supra*, *Cochran v. Louisiana Board of Education*, *supra*.

(7)

The alleged "divisiveness" of the program

Appellants argue—unsupported by any facts—that the released time program has a divisive effect upon the public school children. The fact is that the rules of the Board of Education, instead of having a divisive effect upon the children, provide that all the pupils of all religious faiths participating in the released time program are to be excused at the same time on the same day in any one particular borough and are to be dismissed from school in the usual way and without comment. Misfeasance on the part of any or some school principals in permitting a malfunctioning of the released time regulations is no condemnation of the constitutionality of the released time program in New York City. Any abuses pointed to by the appellants are matters for intra-departmental attention. We call the Court's attention to the magnitude of the New York City school system—a school system that has over 850 school buildings, more than 38,000 teachers, and almost a million pupils. A misunderstanding of the rules and regulations concerning released time may well happen somewhere along the line in an organization of such vast scope. Any deviations from the regulations are solely matters for administrative action by the Board of Education and do not militate against the constitutionality of the program as such.

True it is that divisiveness was present in the *McCullum* case. There, the pupils were segregated according to their respective religious faiths and taught in separately designated classrooms within the school building. Often the religious instruction was given in the presence of the nonparticipating pupils. None of these features of divisiveness is present in the New York City released time program. Important, too, is the rule that no comment of any kind is made in the classroom regarding the attendance or nonattendance of any pupil upon religious instruction.

It is significant that nowhere in the petition do the appellants allege that the rules of the Board of Education are being consciously and purposefully manipulated and abused so as to bring about a pattern the dominant and active purpose of which is to aid religion. There is, thus, no unconstitutional administration of the rules. *Snowden v. Hughes*, 321 U. S. 1 (1943); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

The rules of the New York City Board of Education properly place the entire released time program on a voluntary basis. Release of the children for religious instruction is dependent solely upon the wishes of the parents. Appellants argue nevertheless that an illegal and unconstitutional divisiveness is thereby brought about. We submit that the right to disagree with the advisability of the released time program does not have as its offspring the right to prevent others from joining the program. Mr. Justice JACKSON expressed it quite aptly in the *McCullum* case when he said (333 U. S. at p. 232):

"... here, complainant's son may join religious classes if he chooses and if his parents so request, or he may stay out of them. The complaint is that when others join and he does not, it sets him apart as a dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground."

To be consistent, appellants must also argue that the excused absences of children for whole days at a time for the purpose of religious observances of holy days is

unconstitutional because it leads to the most obvious "divisiveness". Children of one religion stay home from school on their holy days while the other children attend school. On other holy days other children stay home in order to attend worship. Is there anything more obviously divisive than such observance of holy days? Would petitioners ban such holy day observances? To do so, however, would fly in the face of one of the most fundamental constitutional guarantees, namely, the right of religious liberty.

Recognition of this fundamental right as being consistent with our American tradition was given by this Court in *Holy Trinity Church v. United States*, 143 U. S. 457 (1892). This Court said (p. 465):

"But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because *this is a religious people*. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation." (Emphasis added.)

POINT III

There are no triable issues of fact.

The appellants contend that there are issues of fact in this proceeding warranting a trial thereof. They argue that inasmuch as the respondents (appellees herein) submitted affidavits in support of their respective answers they thereby acknowledged that there are triable issues of fact in the case. In support of this argument the appellants quote New York Civil Practice Act, §1291 to the effect that:

"The respondent shall also serve and submit with the answer affidavits, made by a person having knowledge of the facts, or other written proof, showing such evidentiary facts as shall entitle him to a trial of any issue of fact."

Civil Practice Act, §1291 specifically requires a respondent to support the answer with affidavits setting forth the evidentiary facts so that the Court, on the hearing of the application, forthwith may, make such final order as may be warranted by the facts.

Indeed, the New York Court of Appeals has construed Section 1291 to the effect that an answer containing bare denials of the allegations contained in the petition without an affidavit setting forth the respondent's version of the matter in issue amounts practically to a default and a confession that the petitioner is entitled to the relief sought. *Matter of Ackerman v. Kern*, 256 App. Div. 626, 630 (1st Dept., 1939), aff'd 281 N. Y. 87 (1939).

The requirement that affidavits containing evidentiary matter be submitted with the respondent's answer simulates the practice in Article 78 proceedings with that obtaining in motions for summary judgment under Rule 113 of the New York Rules of Civil Practice. The New York State Judicial Council in its 3rd Annual Report for the year 1937 at p. 186, in recommending the adoption of the then proposed Article 78 to the Civil Practice Act, stated:

"The purpose of the requirement that affidavit or other written proof be submitted with the answer, is to enable the court to make a summary disposition of the cause where there are no triable issues of fact, along the lines of Rule 113 of the Rules of Civil Practice. The language of this portion of the proposed section is derived from Rule 113."

This Court in adopting the Federal Rules of Civil Procedures, Rules 12 and 56 providing for summary judgment, has accomplished the same result.

Just as summary judgment may be granted to either party upon the facts contained in affidavits, so also in Article 78 proceedings the Court, upon the hearing of the application and upon considering the pleadings, affidavits and the evidentiary facts referred to therein, may make a

final order granting or denying the relief unless there be triable issues of fact.

The appellants made no reply to the matters contained in the answer and accompanying affidavits submitted on behalf of the Board of Education. The answer and accompanying affidavits submitted by the Board of Education contain a detailed description of the operation of the New York City released time program. Pursuant to Civil Practice Act, §1292 the appellants could have replied thereto setting forth such matters in their reply and reply affidavits as would controvert the allegations of fact in the defendant's answer. Having failed to reply, the facts in defendant's answer and accompanying affidavits are deemed to be true. *Matter of Hines v. LaGuardia*, 293 N. Y. 207, 215 (1944).

An examination of the pleadings and affidavits in this proceeding demonstrates that there are no issues which warrant a trial. The appellants' allegations that the released time program necessarily entails use of the school machinery to aid religion or inevitably results in coercion upon parents or children or results in divisiveness, and similar allegations are merely conclusions of law and not statements of fact. Indeed, these phrases are taken bodily from the language employed by the Justices of this Court in their discussion of the *McCullum* case. Nowhere does the petition allege that the rules are being administered to accomplish an intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U. S. 1 (1944); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

The appellants labor under the misapprehension that the petition was dismissed on its face for failure to state a cause of action; that only the petition was considered. In this they are in error. The petition was dismissed as a matter of law upon a consideration of all the facts in the case—the petition, the answers of the respective appellees, the affidavits in support of this appellee's answer and the appellants' reply and reply affidavits. The order of dismissal specifically recites the fact that the Court read

and considered all the papers, not the petition alone, in arriving at the conclusion that the New York released time program was in all respects constitutional (R. 8).

Appellants are careful to make no claim that the granting or denial of relief under Article 78 without a trial deprives them of rights without due process of law. Their claim in substance, is that a trial in this case would have shown some isolated instances of deviations from the rules. Based on such proof (even though it were not excluded on the grounds of immateriality and irrelevancy) the appellants would then have the inference drawn that the released time statute and the rules thereunder are unconstitutional. The Courts of New York properly held it would be pointless to have a trial, the effect of which would be to allow the appellants to develop such a magnificent *non sequitur*. The papers in the case were sufficiently detailed to give a clear picture of the New York released time system without the necessity of resorting to a trial.

Summary judgment without a trial, where there are no triable issues has been held by the New York Court of Appeals to be constitutional both under the Federal and State Constitutions. *Stewart v. Ahrens*, 273 N. Y. 591 (1937). The disposition of the instant case without a trial raises no Federal question.

The entire factual situation descriptive of the New York released time program has been presented to the Court in the pleadings and the affidavits. Such facts are barren of any triable issue. Thus, there is left for the Court's determination solely a question of law. Is the New York released time program constitutional?

CONCLUSION

The New York released time program is in nowise violative of the letter or spirit of the First Amendment of the Constitution.

The New York program does not breach the "Wall of separation between Church and State".

There is compelling educational justification for the New York released time program.

The New York program strikes a proper accord between the First Amendment prohibition against the "establishment of religion" and the right of parents to direct the education and training of their children.

The New York released time program is so vitally different from the Champaign plan as to render the New York plan free from constitutional objection. Hence as the New York Court of Appeals held, the *McCollum* decision is not at all controlling here.

A majority of the Justices of this Court were in agreement in the *McCollum* case that "released time" *per se* is not unconstitutional. A detailed analysis of the New York program—sanctioned by legislative enactment and operated within the limitations prescribed by the respective rules of the New York State Commissioner of Education and the New York City Board of Education—impels the conclusion that such program fully meets and withstands the test of the Constitution.

The order of the New York Court of Appeals should be affirmed in all respects.

January 28, 1952

Respectfully submitted,

DENIS M. HURLEY

*Corporation Counsel of the City
of New York*

*Attorney for Appellee, The Board of
Education of the City of New York.*

MICHAEL A. CASTALDI,

*First Assistant Corporation Counsel
of the City of New York*

SEYMOUR B. QUEL,

DANIEL T. SCANNELL,

ARTHUR H. KAHN,

of Counsel.

Appendix

Relevant Provisions of the New York Education Law with regard to Compulsory Education

§3204. Instruction required.

1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction.

2. Quality and language of instruction; text-books. Instruction may be given only by a competent teacher. In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English. Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the eleven common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training and the history of New York state.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history.

b. For part time day schools. The course of study of a part time public day school shall include such subjects as will enlarge the civic and vocational intelligence and skill of the minors required to attend.

c. For evening schools. In a public evening school instruction shall be given in at least speaking, reading, and writing English.

d. For parental schools. In a parental school provision shall be made for vocational training and for instruction in other subjects appropriate to the minor's age and attainments.

e. Changes in courses of study. The state education department shall have power to alter the subjects of instruction as prescribed in this section.

4. Length of school sessions. a. A full time day school or class, except as otherwise prescribed, shall be in session for not less than one hundred ninety days each year, inclusive of legal holidays that occur during the term of said school and exclusive of Saturdays.

b. A part time day school or class shall be in session each year for at least four hours of each week during which the full time day schools are in session.

c. Evening schools shall be in session each year as follows:

(1) In cities having a population of one hundred thousand or more, on at least one hundred nights;

(2) In cities having a population of fifty thousand but less than one hundred thousand, on at least seventy-five nights;

(3) In each other city, and in each school district where twenty or more minors from seventeen to twenty-

one years of age are required to attend upon evening instruction, on at least fifty nights.

5. Subject to rules and regulations of the board of regents, a pupil may be excused from such study of health and hygiene as conflicts with the religion of his parents or guardian. Such conflict must be certified by a proper representative of their religion as defined by section two of the religious corporation law.

§3210. Amount and character of required attendance.

1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

2. Attendance elsewhere than at a public school. a. Hours of attendance. If a minor included by the provisions of part one of this article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.

b. Absence. Absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

c. Holidays and vacations. Holidays and vacations shall not exceed in total amount and number those allowed by the public schools.

d. Exception. In applying the foregoing requirements a minor required to attend upon full time day instruction by the provisions of part one of this article may be permitted to attend for a shorter school day or for a shorter school year or for both, provided, in accordance with the regulations of the state education department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that required by the provisions of part one of this article.

e. Registration of certain private schools. No person or persons, firm or corporation, other than the public school authorities or an established religious group, shall establish or maintain a nursery school and/or kindergarten and/or elementary school giving instruction in the ten common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene and physical training, unless the school is registered under regulations of the commissioner. Upon complying with the said regulations and after payment of a fee of twenty-five dollars a certificate of registration shall be issued by the department which shall be valid for a period of two years from the date of issuance unless suspended or revoked within said period pursuant to said regulations. Such registration may be renewed bienially¹ thereafter upon the payment of a renewal registration fee of twenty-five dollars.

¹ Probably should read "biennially".

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED

JAN 16 1952

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM A. D., 1951

TESSIM ZORACH, et al.

Appellant,

v.

ANDREW O. CLAUSON, et al.,

Appellee.

Cause No. 431

BRIEF AND ARGUMENT OF INDIANA AS AMICUS CURIAE

J. EMMETT McMANAMON,
Attorney General of Indiana

IN THE
Supreme Court of the United States

OCTOBER TERM A. D., 1951

TESSIM ZORACH, et al.

Appellant,

v.

ANDREW O. CLAUSON, et al.,

Appellee.

Cause No.....

**BRIEF AND ARGUMENT OF INDIANA
AS AMICUS CURIAE**

Argument

Indiana joins the Appellees and other amici curiae in submitting that the judgment of the New York Court of Appeals should be affirmed on the ground that the statute and rules and regulations adopted pursuant thereto by the New York Commissioner of Education and the New York City Board of Education are constitutional and valid as against Appellant's attack on them.

I.

Indiana has a statute* which authorizes the program of release time for religious education to be implemented by organizations who, through the wish of individual parents, have sought to establish a program of this nature.

Invalidation by this Court of the New York statute and the regulations promulgated pursuant thereto would seriously hinder the educational program as it has evolved in Indiana. Since the decision in *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 648, Indiana's program, and it is assumed those of other States, has been impaired to a great degree for fear of overstepping the boundaries, whatever they may be, as outlined in the McCollum decision regarding religious education and the first amendment to the United States Constitution. It is with this thought that we have felt it appropriate to make this short presentation in the present case.

II.

It is respectfully called to the attention of this Honorable Court that in 1787, the Congress of the United States, organized before the ratification of the Constitution, passed an ordinance concerning the Northwest Territory Government of which Indiana was a part. A portion of that ordinance reads as follows:

“ARTICLES OF COMPACT—NORTHWEST TERRITORY.

“Art. 3. Religion, morality, and knowledge, being necessary to good government and the happiness

* Burns, Indiana Stat. 1948 Rpl. Section 28-505 (a).

of mankind, schools and the means of education shall be forever encouraged. * * *

July 13, 1787, 1 Stat. 51.

In 1800 Congress passed an Act dividing the Northwest Territory and creating, among others, the Indiana Territory. A portion of that Act reads as follows:

"There shall be established within the said territory, a government, in all respects similar to that provided by the ordinance of Congress, passed on the 13th day of July, one thousand seven hundred and eighty-seven, for the government of the territory of the United States north-west of the river Ohio; and the inhabitants thereof shall be entitled to, and enjoy, all and singular, the rights, privileges, and advantages granted and secured to the people by the said ordinance." Burns, Vol. 1, Sec. 2, page 296.

In 1816, by Resolution of Congress, Indiana was admitted to the Union. Part of that resolution reads as follows:

"WHEREAS, (pursuant to the enabling Act, the people of the Indiana Territory formed a constitution and state government which is republican in form) and in conformity with the principles of the Articles of Compact between the original states and the people and States in the territory northwest of the river Ohio passed on the thirteenth day of July, one thousand seven hundred and eighty-seven."

Then follows the declaration of admission.

The Constitution of Indiana as adopted in 1851 reads in part as follows:

"PREAMBLE. To the end, that justice be established, public order maintained, and liberty per-

4

petuated: WE, the People of the State of Indiana, grateful to ALMIGHTY GOD for the free exercise of the right to choose our own form of government, do ordain this Constitution."

"Art. 1.

Section 2. All men shall be secured in their natural right to worship Almighty God, according to the dictates of their own consciences."

"Art. 1.

Section 3. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."

"Art. 1.

Section 4. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."

In 1943, the General Assembly of Indiana enacted a law cited *supra*. It reads as follows:

"If it is the wish of the parent, guardian or other person having control or legal custody of any child, that such child attend, for a period or periods to be determined by the local principal or superintendent of schools and not exceeding in the aggregate one hundred and twenty (120) minutes in any week, a school for religious instruction, conducted and maintained by some church or association of churches, or by some association organized for religious instruction, and incorporated under the laws of this state, and which school shall not be conducted or maintained, either in whole or in part, by the use of any

public funds raised by taxation; such child upon written request of the parent, guardian or other person having legal custody may be permitted to attend such school for religious instruction and such permission shall be valid for not longer than the school year during which it is issued. Such school for religious instruction shall maintain records of attendance which shall at all times be open to the inspection of the public school attendance officers. Attendance at such school for religious instruction shall be given the same attendance credit as at the public school." (Burns, Ind. Stat. 1948 Rpl. Sec. 28-505a).

In 1945-1946 various religious groups and interested parents implemented the provisions of this Act by initiating a program of released time religious education. The Indiana plan has, since this Court's decision in the McCollum case, been modified and represents a system similar to that which prevails at the present time in New York. See Appendix A.

The wall of separation that the Court rightly seeks to maintain could become an "iron curtain",

Zorach v. Clauson (1951), — N. Y. —, 100 N. E. (2d) 463, 467,

if such systems as those which prevail in New York and Indiana, and those other states which have adopted similar programs, were to be struck down.

It would be redundant to restate the opinion of the New York Court of Appeals in the present case. Suffice it to say, that if there is a threat to the constitutional guaranties of this "religious nation" of ours, *Church of Holy Trinity vs. U. S.* 143 U. S. 457, 470, 12 Sup. Ct. 511, 36 L. Ed. 226, by virtue of the present plan, and those similar to it,

then the words of Thomas Jefferson (see the footnotes to Reed, J. Dissent, *Peaple ex rel. McCollum v. Board of Education*, 333 U. S. 203, 245, 68 Sup. Ct. 461, 481-2), become as empty mouthings of a platitudinous moralizer instead of one of the architects of our republican form of government.

Conclusion

For the reasons suggested in this brief and argued in the briefs of Appellee, as well as those of other *Amici Curiae*, Indiana respectfully submits that the judgment under consideration and review by this Honorable Court be sustained.

J. EMMETT McMANAMON,
Attorney General of Indiana

APPENDIX A

A comparative table of the Champaign, Indiana and New York plan for religious education.

	Champaign Plan	Indiana	New York
1. Public compulsory education law.	Illinois-Yes	Yes	Yes
2. Underlying enabling State Statute.	No	Yes—Burns Ind. Stat. 1948 Rpl. Sec. 28- 505a	Yes
3. Parental request is required.	Yes	Yes	Yes
4. Teachers are employed by churches or church groups.	Yes	Yes	Yes
5. Teachers are subject to approval and supervision of the Superintendent of Schools.	Yes	No	No
6. Religious school enrollment cards are furnished and distributed by the school.	Yes	No	No
7. Segregation of students.	Yes	No	No
8. Religious training took place on school property.	Yes	No	No
9. Students not taking religious instructions continue to pursue regular school studies.	Yes	Yes	Yes
10. The place of instruction designated by school officials.	Yes	No	No
11. Pupils solicited in School buildings for religious instruction.	Yes	No	No
12. Maximum time such instruction may be given per week.	30-40 min.	120 min.	1 hour

	Champaign Plan	Indiana	New York
13. Public money is used in furtherance of religious training.		No	No
14. Attendance records are kept.		No	No
	<p>In an opinion of the A.G. 1948, Page The Attorney General suggested a modification of Indiana Plan to conform with the McCollum decision and a directive from the Superintendent of Public Instruction was issued to the local school authorities advising attendance records not be kept, nor attendance credit be given.</p>		
15. Credit is given for attendance at the religion class.		No See Number 14 above	No



LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED

JAN 16 1952

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 431

TESSIM ZORACH and ESTA GLUCK,

Appellants,

vs.

ANDREW G. CLAUSON, Jr., et al., constituting the Board
of Education of the City of New York, and FRANCIS T.
SPAULDING, Commissioner of Education of the State of
New York,

and

THE GREATER NEW YORK COORDINATING COMMIT-
TEE ON RELEASED TIME OF JEWS, PROTESTANTS
AND ROMAN CATHOLICS,

Appellees.

On appeal from the Court of Appeals of the
State of New York.

**AMICUS CURIAE BRIEF FOR THE STATE
OF OREGON**

GEORGE NEUNER,

Attorney General of Oregon

ROBERT F. MAGUIRE,

WILLIAM E. DOUGHERTY,

Of Counsel

INDEX

	Page
Authority for Amicus Curiae Brief	1
Statement of Interest of Amicus Curiae	2
The Situation in Oregon	3
Question Presented	10
Argument	10
Conclusion	18

TABLE OF AUTHORITIES

Decisions

	Page
Bishop of Nesqually v. Gibbon, 158 U.S. 155	2
Davis v. Beason, 133 U.S. 333	12
Everson v. Board of Education, 330 U.S. 1	7, 8, 13
Liggett v. Ladd, 17 Or. 89, 94, 21 Pac. 133	12
McCullum v. Board of Education, 333 U.S. 203	2, 8
Meyer v. Nebraska, 262 U.S. 390, 400	4, 13
Missionary Society v. Dallos, 107 U.S. 336	2
Pierce v. Society of Sisters, 268 U.S. 510, affirming 296 Fed. 928	6, 14
Reynolds v. United States, 98 U.S. 145	8
Watson v. Jones, 13 Wall. 679	13
Yick Wo v. Hopkins, 118 U.S. 356	16

Statutes and Rules

	Page
United States Supreme Court Rules Rule 27(9) (d)	1
United States Statutes 9 Stat. 329	4
11 Stat. 383	4
Oregon Constitution Art. I (9 O.C.L.A., pp. 106-107)	4, 5
Oregon Laws	
Or. L. 1854, p. 34	3
Or. L. 1889, p. 111	6
Or. L. 1923, ch. 1	6
Or. L. 1925, ch. 24	6
Or. L. 1951, ch. 446	8
ch. 572	8, 9
ch. 588	8

Others

	Page
Carey, General History of Oregon Prior to 1861	2, 3, 4
Carey, History of the Oregon Constitution	5
Pollard, Oregon and the Pacific Northwest	3
1951-52 Oregon Blue Book	3
1946-48 Ops. Or. Att. Gen., p. 473	2, 8

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 431

TESSIM ZORACH and ESTA GLUCK,
Appellants,

vs.

**ANDREW G. CLAUSON, Jr., et al., constituting the Board
of Education of the City of New York, and FRANCIS T.
SPAULDING, Commissioner of Education of the State of
New York,**
and

**THE GREATER NEW YORK COORDINATING COMMIT-
TEE ON RELEASED TIME OF JEWS, PROTESTANTS
AND ROMAN CATHOLICS,**
Appellees.

**On appeal from the Court of Appeals of the
State of New York.**

**AMICUS CURIAE BRIEF FOR THE STATE
OF OREGON**

AUTHORITY FOR AMICUS CURIAE BRIEF

This *amicus curiae* brief is respectfully sub-
mitted for the State of Oregon by its Attorney
General pursuant to the Court's Rule 27(9)(d), at
the request of the State Board of Education.

STATEMENT OF INTEREST OF AMICUS CURIAE

Oregon has a 1925 statute similar to the New York law involved here. Further, by Constitution and legislation, the public policy of Oregon requires equally the promotion of education and the freedom of religion. Appellants attack both the particular statute and the general policy.¹

Appellants ask the Court to formulate a broad constitutional doctrine upon the basis of the isolated and local factual (or conclusory) hypothesis presented by this record. The Oregon situation is different from that hypothesis. But the ruling requested would invalidate the Oregon statute and policy.

If the Court wishes to pass upon a constitutional issue affecting all the States, we respectfully suggest that it may be of some value to the Court to be advised of the situation in States other than New York, including Oregon.

THE SITUATION IN OREGON

In the Oregon country "preachers preceded settlers."² Among the most respected leaders of the early period were the missionaries, such as Rev. Jason Lee, Dr. Marcus Whitman, Father Francois

1—Following the decision in *McCullum v. Board of Education*, 333 U.S. 203, upon the request of the Oregon Superintendent of Public Instruction for advice, the undersigned Attorney General gave the opinion that the Oregon statute was valid. 1946-48 Ops. Or. Att. Gen., p. 473.

2—Carey, *General History of Oregon Prior to 1861*, vol. 1, p. 281. Cf., *Missionary Society v. Dalles*, 107 U.S. 336; *Bishop of Nesqually v. Gibbon*, 158 U.S. 155.

Blanchet; and their respective associates.³ Church schools (supported by Baptists, "Campbellites," Catholics, Episcopalians, Friends, Methodists, Presbyterians, or others) and some private schools (supported by individuals or on a subscription basis) provided education for the early settlers. The principal growth of the public school system occurred later.

With that background it is not difficult to understand why the people of Oregon have always regarded, as matters of supreme importance, that education and religious freedom should be *equally* promoted, and that public education should not be used to discriminate against freedom of conscience.

For example, the compact adopted by the people of the Oregon area in 1843 to provide for a provisional government "until such time as the United States of America shall extend their jurisdiction over us" contained the following clause:⁶

3—1951-52 Oregon Blue Book, pp. 189-190. Schools in the old Oregon territory established or named after these men remain as memorials to them: Whitman College in Walla Walla, Washington; Jason Lee's Oregon Institute, now Willamette University, in Salem, Oregon; Father Blanchet's parochial schools, beginning in 1842 with St. Joseph's at St. Paul, Oregon.

4—Poliard, *Oregon and the Pacific Northwest*, pp. 183 *et seq.*; Carey, *op. cit.*, vol. 2, ch. 27.

As elementary education, and in the past fifty years high schools, became otherwise generally available, many of these schools devoted their attention solely to higher education. At present they include: Lewis and Clark, formerly Albany College, now at Portland; Linfield College at McMinnville; Oregon State College, one time Corvallis College, at Corvallis; and Pacific University, at Forest Grove.

5—1951-52 Oregon Blue Book, p. 194.

6—Carey, *op. cit.*, vol. 1, p. 336; and see Or. L. 1854, p. 34.

"Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

This was adopted verbatim from the Ordinance of 1787 (see *Meyer v. Nebraska*, 262 U.S. 390, 400); and was continued as the law of Oregon by the Act of Congress organizing the territorial government (9 Stat. 329).

Again, the territory's first school law, adopted on September 5, 1849, provided that "no preference shall be given *or discrimination shown* on account of religious opinion, whether with the pupils or the teacher, nor shall any laws be enacted by any district that will or may in any way interfere with the rights of conscience in the free exercise of religious worship." (Italics ours.)

The State Constitution preserved this religious freedom, sacrosanct from civil domination or discrimination. The Bill of Rights (Art. I) of the Oregon Constitution, adopted in 1857, and approved by Congress in 1859 (11 Stat. 383), provides in part:

Sec. 2. "All men shall be secured in the natural right to worship Almighty God according to the dictates of their own consciences."

Sec. 3. "No law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."

Sec. 4. "No religious test shall be required, as a qualification for any office of trust or profit."

Sec. 5. "No money shall be drawn from the treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious services in either house of the legislative assembly."⁸

Sec. 6. "No person shall be rendered incompetent as a witness or juror in consequence of his opinions on matters of religion, nor be questioned in any court of justice touching his religious belief, to affect the weight of his testimony."

As explained by Mr. Grover, chairman of the committee on the Bill of Rights in the Oregon constitutional convention:

"It [the Oregon Bill of Rights] guarantees universal toleration upon the matters of religion, in every respect."⁹

"Our government is based upon absolute freedom of conscience, guaranteeing full toleration and protection of religious faith, but at the same time withholding state patronage and political place from the churches."¹⁰

8—Note, however, that sessions are opened with prayer, even though the chaplains are not paid. For example, Rule 1 of the Rules of the Oregon Senate provides in part: "At the opening of the senate, at its first session each day, if there be a minister of the gospel present, the senate shall be opened with prayer." Rule 1 of the House Rules contains substantially the same provision.

9—Carey, History of the Oregon Constitution, p. 131.

10—Id., p. 303.

Oregon first had a compulsory school law in 1889.¹¹ But it provided for compulsory education, *not* compulsory public education. So long as the children were educated, parents were still protected in their right to send their children to any of the many private or church schools. That right is still protected by the latest revision of the statute in 1951.¹²

For a brief interlude, by Or. L. 1923, ch. 1, Oregon attempted to compel children to attend only public schools. That act was declared unconstitutional by this Court in *Pierce v. Society of Sisters*, 268 U.S. 510, affirming 296 Fed. 928.

It is important to note, however, that while that case was pending before this Court and had not yet been argued, Oregon adopted a statute (similar to the New York law here involved) entitled an act "To authorize excusing children attending public schools to attend schools giving religious instruction." It provides (Or. L. 1925, ch. 24; codified as O. C. L. A., Sec. 111-3014):

"That any child attending the public school, on application of his guardian or either of his parents, may be excused from such school for

11—Or. L. 1889, p. 111.

12—Or. L. 1951, ch. 572, sec. 4, provides in part: "In the following cases, children shall not be required to attend public full-time schools:

"(2) Children being taught in a private or parochial school in such branches as are usually taught in the first 12 years in the public schools and in attendance for a period of time equivalent to that required of children attending public schools."

a period or periods not exceeding one hundred and twenty (120) minutes in any week to attend week day schools giving instruction in religion."

Thus, even at a time when it was thought that children should receive their secular education in public schools, the Legislative Assembly recognized that the public schools did not have an inflexible secular curriculum usurping all of the child's time, and that parents were privileged to have their children receive religious instruction outside the public schools. Of course, like any privilege, its exercise was by choice.

Accordingly, the situation in Oregon now is substantially the same as that of which Thomas Jefferson¹³ spoke concerning religious liberty at the University of Virginia: Religion is certainly not taught in the public school; and equally the civil authority certainly does not preclude or discriminate against religious instruction elsewhere. Jefferson said that, while in accordance with the constitutional principle a chair of divinity had not been established at the University,

"It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society."¹⁴

13—This court has recognized that the provisions in the First Amendment, now applied under the Fourteenth Amendment, "had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute" which Jefferson drafted. *Everson v. Board of Education*, 330 U.S. 1, 13.

For interpretive light the Court has also referred to Jefferson's

With respect to the present Oregon practice under the particular statute in question, the Oregon Superintendent of Public Instruction has described it as follows: "With parental consent students are being released during school hours to attend week-day schools giving instruction in religion or the Bible off the school premises. Such schools may be conducted by one church denomination or several denominations may be cooperating in giving said religious instruction. Pupils not attending said classes continue with their school work."¹⁵

In Oregon the particular school district is given discretion in determining the hours of the school day,¹⁶ and in making regulations for the conduct of the school.¹⁷

comments on religious liberty, including his "wall of separation" letter, of January 1, 1802, to the Baptists. E.g., *Reynolds v. United States*, 98 U.S. 145, 164; *Everson v. Board of Education*, supra at 16; *McCullum v. Board of Education*, 333 U.S. 203, 212.

14—*McCullum v. Board of Education*, 333 U.S. 203, 245.

The quotation continues: "On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation."

15—1946-48 Ops. Or. Att. Gen., p. 473.

* 16—The statute provides (Or. L. 1951, ch. 446, sec. 2):

"When in charge of a school or class, as applicable, a teacher shall:

"(2) Except when a different or lesser number of hours has been ordered by the district school board, commence school at 9 a.m. and close at 4 p.m. daily with one hour for recreation at noon."

17—The statute provides (Or. L. 1951, ch. 588):

"Sec. 1. Except where statutes are inconsistent with this section, district school boards shall have entire control of their district public schools and of teachers employed by the district."

"Sec. 3. Each district school board may establish rules and regulations for the government of the schools and pupils consistent with the rules and regulations of the State Board of Education."

The compulsory education law contains many exceptions. Or. L. 1951, ch. 572. Some students (i.e., legally employed children) may attend a part-time school. Others may not attend any school. A few examples of the latter include: Children who have acquired sufficient knowledge, children who live at a distance from school or available transportation, children who are being taught by parent or private teacher, children excused by the school board in certain instances.

Generally in matters affecting part-time absences of students, public school authorities act with regard to the reasonable demands of parents compatible with the needs of instruction. It is, of course, recognized that the curriculum is not so inflexible that it may not accommodate extracurricular activities.

In many instances upon the requests of parents public school authorities, whether by formal regulation or as a matter of practice, excuse or at least raise no question about the absence of some students while others remain in school. For example, in some school districts it is a practice for students to be excused at reasonable times to take private music lessons, even though it may cause some embarrassment to the student who is so excused or to the student who is not.

To our knowledge no serious question has been raised concerning the propriety of the practices of

public school authorities, within reasonable limits and with the consent of the respective parents, permitting some students to be excused, for example, to play in a school band at some civic meeting not connected with the school, to practice with a junior symphony group not connected with the school, to assist in some civic festival not connected with the school, to ride on an early school bus so as to be home before darkness, to deliver on a newspaper route, to assist in a local agricultural crisis, or in the case of students whose class work has been of a particularly exemplary standard to play while others are taking examinations.

QUESTION PRESENTED

Where the public school has a flexible curriculum and in fact permits reasonable part-time absence for extra-curricular activities, may the public authority preclude such reasonable part-time absence on the ground that the purpose is to exercise the constitutionally-guaranteed freedom of religion?

ARGUMENT

It would be presumptuous, for us, to argue the intendments of the recent opinions by members of the Court concerning religious liberty, or to reiterate arguments which have been so well-stated by others. Instead, we should like to submit that, in view of the Oregon situation, any policy for this State other than that of the statute in question would be unconstitutional.

With respect to the Oregon situation, as indicated by the statutes and practices mentioned above, the public school authorities have not in fact purported to assume an exclusive and inflexible control of the child during certain hours and in certain public buildings or areas, to the extent of barring any outside extra-curricular activities. And the school authorities do not assume that there is a certain quantum of education to be poured uniformly into all students within the same designated and unvarying period of time. Some students who are attending school may find home-work necessary in non-school hours, and some may be allowed part-time absences. No one heretofore has questioned the power of the school authorities to make regulations reasonably adapted to require its educational function to be first served during school hours, or reasonably adapted to permit children outside interests.

Children attending private or parochial schools are required to attend an "equivalent" amount of time as those in public school, and it is well known that the private or parochial school may include religious instruction within that time. Under the permissive statute involved here public-school children may obtain similar instruction within the same time, but outside the public school.

As the permissive statute stands, there is no conflict between the State and the respective parent whose child is attending public school and who

wishes his child to receive religious instruction. Complaint then could be made only by a third person who does not wish to exercise that privilege, who disagrees with the legislative policy, and who wishes the civil authority to conform all others to his special persuasion in that particular. If the statute be invalid, all minorities would be required to conform to that tenet of one minority. This would defeat the primary objective of the First Amendment. *Davis v. Beason*, 133 U.S. 333, 342.

In view of the Oregon situation, any policy other than that of the statute in question would produce an unconstitutional factual result in two ways:

First, by a negative hostility to religious liberty. This basic freedom includes the right to teach, and to receive instruction in, matters of conscience. "The right of mankind to believe and teach such doctrines regarding religion as meet the approval of their consciences is recognized under our form of government as inherent; it is freely accorded to every sect and denomination in the land; . . ." *Liggett v. Ladd*, 17 Or. 89, 94, 21 Pac. 133. If the public authorities permitted part-time absence for any reasonable purpose *except* outside religious instruction, then the purported governmental aloofness from religion would in fact be used to discriminate against religious liberty.

The attack on the statute disregards one of the essential parts of the complex of religious liberty.

The critics of the legislative policy would rescue "temporal institutions from religious interference," but would *not* secure "religious liberty from the invasion of the civil authority." *Everson v. Board of Education*, 330 U.S. 1, 15; *Watson v. Jones*, 13 Wall. 679, 730.

Second, by requiring active interference with religious observances. What the civil authority could not expressly permit, it could not tacitly allow. Now, no question is raised if a child is absent from public school in observance of, for example, Passover or Good Friday. If such a part-time absence be forbidden by the Constitution, then it necessarily follows that the civil authority would be required to actively prevent it. Incredibly, in the United States, a truant officer would be sent to the synagogue or cathedral to recapture the child.

Constitutional liberties are not abstractions. They must exist, if at all, as realities. The necessary extension of the arguments against the instant statute would invalidate such things as Thanksgiving proclamations and Federal tax exemptions for religious corporations. Whether or not a legalistic argument can be made against such commonplaces, it is persuasive evidence of their constitutionality that they accord with both received tradition and present-day legislative and executive policies.

Our Constitution is not that of Plato's Commonwealth. Cf., *Meyer v. Nebraska*, 262 U.S. 390, 401-402.

"The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535. These obligations may properly involve instruction in the faith of his parents, free from active or passive civil interference.

The objects of the constitutional provisions involved in this case, are the protection of minorities—to enable them to exercise freedom of conscience, freedom in worship and religious instruction; to relieve them from being compelled to attend any State church or State-supported church; to send their children to State-supported schools in which religious instruction in any faith other than their own, is a part of the school curriculum; to protect them from being mulcted by taxation to support either a State church or churches, or State schools teaching religious beliefs or dogmas; in short, it was to permit the dissenting individual citizen from having any religious faith or religious instruction imposed upon him or his children, from being compelled, directly or indirectly, to have thrust upon him or them the tenets or doctrines of any faith and to be freed from directly or indirectly contributing to the support of the principles of any faith.

Neither the New York nor Oregon statutes infringe upon any of these objectives. They merely recognize the inherent constitutional rights of every citizen and every parent to choose his own beliefs, to practice them, to worship as he chooses and to carry out what he deems to be his duty to his children that they shall have a reasonable opportunity to be instructed in the tenets of his faith. These statutes require no financial support from the State, no use of school buildings or facilities, no control or supervision over what is taught or by whom it is taught or where it is taught. Only those who desire, receive it and no penalty direct or indirect, is imposed for failure to exercise the privilege. In fact, the only limitation which can possibly be suggested is that if the parent exercises the right to obtain released time for the purpose of giving his child religious teaching, it must be obtained in good faith, and that the child, during that time, shall use it for the purpose for which he is excused. This is no different from saying that if the parent has his child excused from school for one reason, neither he nor the child shall use the excused time for a purpose foreign to that for which the excuse is granted.

Should it be asserted that to uphold the New York and Oregon statutes the door is to be thrown open to an abusive extension of released time the answer is clear. The law has always recognized that while discretion may be granted, for instance to

administrative agents, and when exercised is not ordinarily the subject of judicial review, nevertheless, when such discretion is abused those suffering from it may seek and obtain relief from the courts; that even where the law, regulation or ordinance is fair and reasonable on its face, if it is administered in a corrupt, unreasonable, unfair and unduly harsh or discriminatory fashion, it will either be struck down or the administrators enjoined from so doing. *Yick Wo v. Hopkins*, 118 U.S. 356.

Thus the Court would undoubtedly follow the practice it has enunciated since the institution of the government in giving every fair presumption to reasonableness, either in State law, municipal ordinance or administrative regulation and to the administrators thereof who exercise discretion; nevertheless, it has the power and would in proper case promptly assert and take jurisdiction to set aside any where it deems reasonableness has been neglected, or where administration has become either corrupt, unduly harsh, discriminatory, unfair or unreasonable.

Liberty of conscience, of thought, and of act is of the essence of freedom. Its neglect and destruction throughout vast areas in the world and the unlovely consequences thereof are too fresh in our minds and their impact upon us and others too immediate to permit any attitude in this country, other than of devotion to its establishment and maintenance, even

for the benefit of those whose beliefs and practices, political, economical or religious we do not ourselves approve.

To permit the parent to have his child released from school for a reasonable period of time not substantially affecting his schooling is not an infringement of the First or Fourteenth Amendments; it involves no question of "respecting the establishment of religion"; but is a forthright recognition of the next following clause, "the free exercise thereof."

Too often has the voice and mind of him who vociferously asserts that he demands freedom been found in fact to proclaim a love of and insistence of freedom for himself and those who agree with him and the denial of it to those with whom he differs—a conflict and a contradiction of which he is seldom aware.

To strike down either the New York or Oregon statutes is to deny religious freedom, not to maintain it.

CONCLUSION

In Oregon the practice is to permit reasonable part-time absence from public school for various purposes. The legislative policy is to include among those purposes for which such reasonable part-time absence is allowed, the purpose of obtaining religious instruction outside the public school. It is our submission not only that the legislative policy does not infringe upon the constitutional guarantee of religious freedom, but also that under the circumstances any other policy would discriminate against the exercise of the basic liberty.

Respectfully submitted,

GEORGE NEUNER,

Attorney General of Oregon.

ROBERT F. MAGUIRE,

WILLIAM E. DOUGHERTY,
Of Counsel.

January, 1952

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED

JAN 18 1952

Supreme Court of the United States.

OCTOBER TERM, 1951

No. 431

IN THE MATTER OF THE APPLICATION OF TESSIM ZORACH
AND ESTA GLUCK, PETITIONERS-APPELLANTS, FOR AN
ORDER PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE
ACT,

Against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN,
GEORGE A. TIMONE, AND JAMES MARSHALL,
CONSTITUTING THE BOARD OF EDUCATION OF THE CITY OF
NEW YORK, AND FRANCIS T. SPAULDING, COMMISSIONER OF
EDUCATION OF THE STATE OF NEW YORK, RESPONDENTS,
DIRECTING THEM TO DISCONTINUE CERTAIN
SCHOOL PRACTICES, AND THE GREATER NEW YORK
COORDINATING COMMITTEE ON RELEASED
TIME OF JEWS, PROTESTANTS AND ROMAN
CATHOLICS, INTERVENOR-RESPONDENT.

BRIEF FOR FRANCIS E. KELLY, ATTORNEY GENERAL
OF THE COMMONWEALTH OF MASSACHUSETTS, AMICUS CURIAE, IN SUPPORT OF
RESPONDENT COMMISSIONER OF EDUCATION
OF THE STATE OF NEW YORK.

FRANCIS E. KELLY,

Attorney General of the

Commonwealth of Massachusetts,

Of Counsel:

Amicus Curiae.

CHARLES H. WALTERS,

Assistant Attorney General,

WILLIAM F. MARCELLA.

Subject Index.

	Page
Statement	2
Issues	2
Pertinent constitutional provisions and statutes involved	2
Constitution of the United States, Amendments, article XIV	2
Constitution of Massachusetts	
Declaration of Rights, article II	3
Amendments, article XI	3
Amendments, article XVIII, section 1, as found in article XLVI of the Amendments	3
Massachusetts General Laws (Tercentenary Edition) chapter 71, section 31	4
Argument	4
I. The Massachusetts statute compared favorably with the New York statute	4
The rules of the State Commissioner of Education	6
II. The statutes of Massachusetts and New York are constitutional	7
III. Released time for religious purposes furthers education	10
Conclusion	12

Table of Authorities Cited.

CASES.

	Page
Cantwell v. Connecticut, 310 U.S. 296	7
Francis E. Kelly, Attorney General, v. Inhabitants of the Town of Dover, Mass. Adv. Sh. (1951) 849	11
Glaser v. Congregation Kehillath Israel, 263 Mass. 435	10
Opinion of the Attorney General to the Commissioner of Education dated January 7, 1941	8, 9
People, ex rel. Lewis, v. Graves, 245 N.Y. 195	9
Spiller v. Inhabitants of Woburn, 12 Allen, 127	9, 11

STATUTES.

Mass. Constitution, Amendments

Art. II	3
Art. XI	3, 10
Art. XVIII, sec. 1	3
Art. XLVI	3
Mass. G.L. (Ter. Ed.) c. 71, § 31	4, 9
Mass. St. 1855, c. 410	9
Mass. St. 1941, c. 423, amending G.L. (Ter. Ed.) c. 76, § 1	4
Mass. St. 1950, c. 400, amending G.L. (Ter. Ed.) c. 76, § 1	5
N.Y. Education Law, art. 65, part I, §§ 3201-3229	5, 6
Regulations of the Commissioner of Education, art. 17, § 154; State of New York, Official Compilation of Codes, Rules and Regulations, vol. 1, p. 683	6, 7
U.S. Constitution, Amendments, Art. XIV	2

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 431.

IN THE MATTER OF THE APPLICATION OF TESSIM ZORACH
AND ESTA GLUCK, PETITIONERS-APPELLANTS, FOR AN
ORDER PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE
ACT,

Against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN,
GEORGE A. TIMONE, AND JAMES MARSHALL,
CONSTITUTING THE BOARD OF EDUCATION OF THE CITY OF
NEW YORK, AND FRANCIS T. SPAULDING, COMMIS-
SIONER OF EDUCATION OF THE STATE OF NEW YORK, RE-
SPONDENTS, DIRECTING THEM TO DISCONTINUE CERTAIN
SCHOOL PRACTICES, AND THE GREATER NEW YORK
COORDINATING COMMITTEE ON RELEASED
TIME OF JEWS, PROTESTANTS AND ROMAN
CATHOLICS, INTERVENOR-RESPONDENT.

BRIEF FOR FRANCIS E. KELLY, ATTORNEY GEN-
ERAL OF THE COMMONWEALTH OF MASSA-
CHUSETTS, AMICUS CURIAE, IN SUPPORT OF
RESPONDENT COMMISSIONER OF EDUCATION
OF THE STATE OF NEW YORK.

Statement.

This is a brief *amici curiae* in support of the main brief of the respondent Commissioner of Education of the State of New York.

It is our purpose to cite and argue certain pertinent decisions of the Massachusetts Supreme Judicial Court and a few decisions of the highest courts in some other jurisdictions which are not cited in the respondent's main brief. It is not, however, our intention to be redundant in so far as the respondent's main brief is concerned. In the *Zorach* case the constitutionality of the New York statute is being tested on released time. Massachusetts has a pertinent statute which compares favorably with this New York statute. Therefore we contend that we have a real interest in this case in order to protect the constitutionality of our statute.

Issues.

1. Whether or not the Massachusetts statute compares favorably with the New York statute.
2. If so, then are the statutes of New York and Massachusetts constitutional?
3. Whether released time for religious purposes furthers education.

Pertinent Constitutional Provisions and Statutes Involved.

Constitution of the United States, Amendments, Article XIV.

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

*Constitution of Massachusetts, Declaration of Rights,
Article II.*

"It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship."

Amendments, Article XI.

"As the public worship of God and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government;—therefore . . . all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law."

*Amendments, Article XVIII, Section 1; as found in
Article XLVI of the Amendments.*

"SECTION 1. No law shall be passed prohibiting the free exercise of religion."

*Massachusetts General Laws (Tercentenary Edition),
Chapter 71, Section 31.*

"A portion of the Bible shall be read daily in the public schools; without written note or oral comment; but a pupil whose parent or guardian informs the teacher in writing that he has conscientious scruples against it, shall not be required to read from any particular version, or to take any personal part in the reading. The school committee shall not purchase or use in the public schools school books favoring the tenets of any particular religious sect."

Argument.

I.

**THE MASSACHUSETTS STATUTE COMPARED FAVORABLY WITH
THE NEW YORK STATUTE.**

St. 1941, c. 423, amending G.L. (Ter. Ed.) c. 76, § 1 (approved June 30, 1941), an Act authorizing the absence from public schools at certain times of children for the purpose of religious education and prohibiting the expenditures of public funds for such education or for transportation incidental thereto:

"Absences may also be permitted for religious education at such times as the school committee may establish; provided, that no public funds shall be appropriated or expended for such education or for transportation incidental thereto; and provided, further, that such time shall be no more than one hour each week. (For the purposes of this section, school committees shall approve a private school only when the instruction in all the studies required by law is in English, and when satisfied that such instruction equals in thoroughness and efficiency, and in the prog-

ress made therein; that in the public schools in the same town; but they shall not withhold such approval on account of religious teaching)”

St. 1950, c. 400 (approved May 4, 1950), struck out the last sentence in G.L. (Ter. Ed.) c. 76, § 1, namely, that sentence embraced by parentheses, and inserted a new sentence plus a new paragraph as follows:

“For the purposes of this section, school committees shall approve a private school only when the instruction in all the studies required by law is in English, and when satisfied that such instruction equals in thoroughness and efficiency, and in the progress made therein; that in the public schools in the same town; but shall not withhold such approval on account of religious teaching, and, in order to protect children from the hazards of traffic and promote their safety, cities and towns may appropriate money for conveying pupils to and from any schools approved under this section.

“Pupils who, in the fulfillment of the compulsory attendance requirements of this section, attend private schools of elementary and high school grades so approved shall be entitled to the same rights and privileges as to transportation to and from school as are provided by law for pupils of public schools and shall not be denied such transportation because their attendance is in a school which is conducted under religious auspices or includes religious instruction in its curriculum.”

Released time operates in New York State today pursuant to section 3210 of the Education Law—a part of the Compulsory Attendance Law (Education Law, art. 65,

part I, §§ 3201-3229). The statute gives legislative approval to a practice, followed prior to its adoption in 1940, by local school authorities acting under general supervisory powers, conferred upon them by the Education Law. It provides in subdivisions 1-a and 1-b as follows:

"§ 3210. Amount and character of required attendance

"1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

"b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

The provision permitting absence for religious observance and education first came into the statute by amendment of former section 625 of the Education Law by chapter 305 of the Laws of 1940. That section has since been renumbered 3210.

The Rules of the State Commissioner of Education.

The rules of the State Commissioner of Education of New York adopted on July 4, 1940, to implement the statutory provision, and now remaining in full force and effect, provide as follows:

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be ex-

cused upon the request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools." (Regulations of the Commissioner of Education, art. 17, § 154; State of New York, Official Compilation of Codes, Rules and Regulations, vol. 1, p. 683.)

By mere observance of the wording of both statutes, it must be readily ascertained without the necessity of further argument that they compare favorably one with the other in all pertinent aspects.

II.

THE STATUTES OF MASSACHUSETTS AND NEW YORK ARE CONSTITUTIONAL.

In *Cantwell v. Connecticut*, 310 U.S. 296, it was held that the Fourteenth Amendment, which is applicable only to the States, embraces the liberty guaranteed by the First

Amendment, namely, the free exercise of religion. This freedom is twofold: freedom to believe and freedom to act. A State may by general and non-discriminatory legislation regulate the act. In said case the accused solicited funds for his religious denomination's cause in violation of a statute which required a license. The Court said the State may regulate the time, places and manner of soliciting on its streets and of holding meetings thereon; but it cannot deny the right to preach and disseminate religious views. Soliciting funds for a religious purpose was held to be the equivalent of an exercise of religion.

In 1940 the Honorable Walter F. Downey, Commissioner of Education of the Commonwealth of Massachusetts, requested of the then Attorney General, Paul A. Dever, an opinion upon the legality of a plan, then under consideration by the School Committee of the City of Boston, to "release pupils part time from school to receive religious education outside of school buildings at the request of the parents."

Opinion of the Attorney General to the Commissioner of Education dated January 7, 1941.

In this opinion it was stated that "Neither the Forty-sixth Article of the Amendment (proposed by the Constitutional Convention of 1917) nor any other article of the Constitution, however, discriminates against religion or religious instruction."

The Commonwealth of Massachusetts has always endeavored as have other States to work in conjunction with the church. The Legislature as far back as 1855, which proposed the Eighteenth Amendment, enacted a law providing that "the school committee of each town and city in this Commonwealth shall require the daily reading of some portion of the Bible in the common English version . . ."

(St. 1855, c. 410), a provision now contained in substance in G.L. (Ter. Ed.) c. 71, § 31, although qualified by the provision that the reading must be "without written note or oral comment" and that "a pupil whose parent or guardian informs the teacher in writing that he has conscientious scruples against it, shall not be required to read from any particular version, or to take any personal part in the reading."

After the adoption of the Eighteenth Amendment, the Massachusetts Supreme Judicial Court held in *Spiller v. Inhabitants of Woburn*, 12 Allen, 127, in 1866, that the school committee of Woburn might lawfully pass an order that the schools thereof should be opened each morning with reading from the Bible and prayer, and that during the prayer each student should bow the head unless his parents requested that he be excused from so doing, and that it might lawfully exclude from the school a student who refused to comply with such order whose parents refused to request that he be excused from doing so.

As Justice Pound so aptly stated in *People, ex rel. Lewis, v. Graves*, 245 N.Y. 195:

"Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support."

Attorney General Paul A. Dever in his aforementioned opinion said:

"It is my opinion that the Forty-sixth Article of Amendment of the Massachusetts Constitution is to be construed in the same manner as the New York Court of Appeals construed the similar constitutional provision of that state¹ and for the reason stated.

¹ *People, ex rel. Lewis, v. Graves*, 245 N.Y. 195.

"I am therefore of opinion that the Massachusetts Constitution does not prohibit the Boston School Committee from releasing pupils part time from school to receive religious education outside of public school buildings, at the request of their parents, provided that the plan adopted involves no expenditure of public funds, the use of public property or the loan of public credit."

In the case now before this Court the State of New York in providing "released time for religious purpose" has not expended public funds or property, and has provided for all religious sects and denominations. Thus they have complied with the Massachusetts Eleventh Article of Amendment, guaranteeing equal protection to all religious sects and denominations, not only of the Christian religion but others as well.

For the Massachusetts Supreme Judicial Court has held that the guaranties of religious equality are not confined to adherents of the Christian faith, and that they protect Jews as well as Christians.

Glaser v. Congregation Kehillath Israel, 263 Mass. 435, 437.

III.

RELEASED TIME FOR RELIGIOUS PURPOSES FURTHERS EDUCATION.

Eliminating this so-called "released time" obviously puts obstacles in the path of education rather than facilitating it.

It necessarily follows that "released time" for religious purposes is a fundamental part of education and as such should be a part of the school curriculum.

Eliminating the so-called "released time" for religious purposes would make for discord rather than harmony.

The history of our great stride in the field of education discloses that the fulcrum of our success is the contribution made by the many sects or denominations which founded our great institutions of learning. The States and churches have throughout history endeavored to cooperate each with the other.

Francis E. Kelly, Attorney General, v. Inhabitants of the Town of Dover, Mass. Adv. Sh. (1951) 849.

"Education" means "discipline of the mind or character through instruction or study."

The dissemination of every legitimate form of knowledge, including religious beliefs, tenets, religious philosophy or theology, would come within the definition of education.

Thus the released time for religious purpose affords the students further education.

The purpose of education is to educate the whole of man, morally, socially, physically and spiritually.

Efforts to gain religious certitudes often produce bewilderment and skepticism. It is therefore the duty not only of the church but also of the State harmoniously to help in the guidance of our youth.

Chief Justice Bigelow, writing the opinion of the Court in the case of *Spiller v. Inhabitants of Woburn*, 12 Allen, 127, said:

"No more appropriate method could be adopted of keeping in the minds of both teachers and scholars that one of the chief objects of education, as declared by the statutes of this commonwealth, and which teach-

ers are especially enjoined to carry into effect, is 'to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice, and a sacred regard for truth'."

Conclusion.

We respectfully submit, therefore, that upon all of the foregoing the statute involved herein is constitutional.

Respectfully submitted,

FRANCIS E. KELLY,

Attorney General for the Commonwealth of Massachusetts,

Amicus Curiae.

Of Counsel:

CHARLES H. WALTERS,

Assistant Attorney General,

WILLIAM F. MARCELLA.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.

FILED

JAN 21 1952

CHARLES F. MOORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1951.

No. 431.

TESSIE ZORACH and ESTA GLUCK,

Appellants,

vs.

ANDREW G. CLAUSON, JR., et al.,

Appellees.

Motion of State of California for Leave to File Brief
Amicus Curiae, and Brief of State of California
as Amicus Curiae in Support of Appellees' Posi-
tion.

EDMUND G. BROWN,

Attorney General of California,

WILLIAM V. O'CONNOR,

Chief Deputy Attorney General,

HOWARD S. GOLDIN,

Deputy Attorney General,

217 West First Street,

Los Angeles 12, California,

Attorneys for Amicus Curiae, State of California.

SUBJECT INDEX

PAGE

Motion of State of California, a sovereign state, for leave to file a brief amicus curiae, in support of position of the appellees, Board of Education of the City of New York and the New York State Commissioner of Education urging the constitutionality of the New York State "Released Time Program"..... 1

Brief of State of California as amicus curiae in support of appellees' position 3

Interest of the State of California..... 3

Statement of the case..... 5

Opinions below 8

Question presented 8

Argument 9

I.

The constitutionality of similar released time programs heretofore has been determined by New York courts..... 9

II.

A California released time program authorized by statute has been held constitutional by the California court..... 11

III.

The case of People v. State of Illinois ex rel. McCollum v. Board of Education is distinguishable from the instant case 16

Conclusion 24

TABLE OF AUTHORITIES CITED

CASES	PAGE
Gordon v. Board of Education of the City of Los Angeles, 78 Cal. App. 2d 464, 174 P. 2d 488; hear. den., 78 Cal. App. 2d 481, 178 P. 2d 488.....	4, 11, 13, 14, 24
Lewis v. Spaulding, 193 Misc. 66, 85 N. Y. S. 2d 682; appeal withdrawn, 299 N. Y. 564, 85 N. E. 2d 791.....	10
People ex rel. Lewis v. Graves, 245 N. Y. 195, 156 N. E. 662	9, 10, 21
People of the State of Illinois ex rel. McCollum v. Board of Education, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649, 2 A. L. R. 2d 1338.....	10, 16, 17, 18, 19, 21, 22, 24, 25
Stein v. Brown, 125 Misc. 692, 211 N. Y. Supp. 822.....	9, 10
Zorach, et al. v. Clauson, et al., 100 N. E. 2d 463.....	6, 9, 11

STATUTES	
California Constitution (Preamble).....	11
California Constitution, Art. I, Sec. 4.....	11, 13
California Constitution, Art. IV, Sec. 30.....	12, 13
California Constitution, Art. IX, Sec. 8.....	12, 13
California Education Code, Sec. 8286	3, 4, 12
California Statutes of 1943, Chap. 367.....	4
New York Civil Practice Act, Art. 78.....	5
New York Constitution (Preamble).....	11
New York Constitution, Art. I, Sec. 3.....	7, 8, 11
New York Education Law, Sec. 3210.....	3, 5, 10, 22
New York Laws of 1940, Chap. 305, Sec. 1.....	3, 10

1 New York Official Compilation of Codes, Rules and Regulations, p. 683.....	6
Regulations of Commissioner of Education, New York City, Art. 17, Sec. 154.....	6
Rules of the United States Supreme Court, Rule 27, 9(d).....	1
United States Constitution, First Amendment.....	6, 8, 16
United States Constitution, Fourteenth Amendment.....	6, 8, 16

TEXTBOOKS

39 Georgetown Law Journal, pp. 148, 150.....	24
3 The Public and Education (No. 3, May 25, 1948).....	24
14 University of Detroit Law Journal, pp. 216-217.....	24

IN THE
Supreme Court of the United States

October Term, 1951.

No. 431.

TESSIM ZORACH and ESTA GLUCK,

Appellants,

vs.

ANDREW G. CLAUSON, JR., *et al.*,

Appellees.

Motion of State of California, a Sovereign State, for
Leave to File a Brief *Amicus Curiae*, in Support
of Position of the Appellees, Board of Education
of the City of New York and the New York State
Commissioner of Education Urging the Constitu-
tionality of the New York State "Released Time
Program."

Motion.

The State of California, sponsored and appearing by its
Attorney General, respectfully moves that it may be per-
mitted to file a brief *Amicus Curiae*, pursuant to Rule 27,
9(d) of this Honorable Court, in support of the position
of appellees, Board of Education of the City of New
York, and the New York State Commissioner of Educa-

tion urging the constitutionality of the New York State
"released time law."

EDMUND G. BROWN,
Attorney General of the State of California,

WILLIAM V. O'CONNOR,
Chief Deputy Attorney General,

HOWARD S. GOLDIN,
Deputy Attorney General,

Attorneys for Amicus Curiae, State of California.

IN THE
Supreme Court of the United States

October Term, 1951

No. 431.

TESSIE ZORACH and ESTA GLUCK,

Appellants,

vs.

ANDREW G. CLAUSON, JR., *et al.*,

Appellees.

**Brief of State of California as Amicus Curiae in
Support of Appellees' Position.**

Interest of the State of California.

The instant appeal challenges the constitutionality of the "released time" program in New York City, whereby parents may withdraw their children from public schools one hour a week to receive religious instruction in the faith of their acceptance. Such New York City program found statutory authorization in Section 3210 of the New York Education Law, L. 1940, Ch. 305, Sec. 1. Like the State of New York, the State of California has a released time statute, namely Section 8286 of the Education Code

of the State of California,¹ the constitutionality of which statute has been upheld by the California courts in the case of *Gordon v. Board of Education of the City of Los Angeles*, 78 Cal. App. 2d 464, 174 P. 2d 488, hearing denied by California Supreme Court, 78 Cal. App. 2d 481, 178 P. 2d 488 (1947).

The People of the State of California through their legislature, in the enactment of Section 8286 of the California Education Code have approved the policy of statutory authorization for released time programs. Where, as in the instant case, an expression of similar policy by a sister state has been expressed in legislation and a released time program which appears constitutionally unobjectionable, California is interested in having established the validity thereof.

¹California Education Code, Section 8286, added by Stats. 1943, Chap. 367, reads as follows:

"Pupils, with the written consent of their parents or guardians, may be excused from school in order to participate in religious exercises or to receive moral and religious instruction at their respective places of worship or at other suitable place or places designated by the religious group, church, or denomination, which shall be in addition and supplementary to the instruction in manners and morals required elsewhere in this code. Such absence shall not be deemed absence in computing average daily attendance, if all of the following conditions are complied with:

(a) The governing board of the district of attendance, in its discretion, shall first adopt a resolution permitting pupils to be absent from school for such exercises or instruction.

(b) The governing board shall adopt regulations governing the attendance of pupils at such exercises or instruction and the reporting thereof.

(c) Each pupil so excused shall attend school at least the minimum school day for his grade for elementary schools, and as provided by the relevant provisions of the rules and regulations of the State Board of Education for secondary schools.

(d) No pupil shall be excused from school for such purpose on more than four days per school month.

It is hereby declared to be the intent of the Legislature that this section shall be permissive only."

Statement of the Case.

Petitioners, citizens and taxpayers, and parents of children attending public school in the City of New York, brought a proceeding pursuant to Article 78 of the New York Civil Practice Act against two respondents, namely, the Board of Education of the City of New York and the Commissioner of Education of the State of New York seeking an order directing the respondents to discontinue the practice in New York State of releasing children from the public schools to permit them to receive religious instruction. Such practice, often designated as a "released time" program, authorizes the excusing of pupils from school for one hour or less weekly, upon request of their parents, to enable them to attend classes in religious instruction or education, outside of the school buildings and premises and under the auspices of the churches of the parents' acceptance. The enabling state statute in New York authorizing such released time program is Section 3210 of the Education Law² and pursuant thereto the

²Section 3210 of the New York Education Law provides:

"Amount and character of required attendance.

1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. *Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.* (Emphasis added.)

Commissioner of Education promulgated certain rules³ while additional rules were established by the New York City Board of Education.⁴

The petition challenged the enabling statute and the rules of the Commissioner and Board of Education upon the ground that they violate the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Federal Constitution, as applied to the states by the Fourteenth Amendment, and upon the ground that they prohibit the free exercise of religion in violation of the First and Fourteenth Amendments of the

³The State Commissioner of Education has promulgated the following rules Regulations of Comr. of Educ., Art. 17, Sec. 154; 1 N. Y. Official Compilation of Codes, Rules and Regulations, p. 683:

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

2. The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.

3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

⁴Additional Rules Established by New York City Board of Education are set forth in *Zorach, et al. v. Clauson, et al.* (Ct. App. N. Y.), 100 N. E. 2d 463, at pp. 464-465, as follows:

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils

Federal Constitution and Section 3, Article I of the New York State Constitution.

The Supreme Court, Special Term, Kings County, Part 1, Di Giovanna, J., held that assuming all the facts set forth in the petition were deemed to be true nothing had been shown to warrant a finding that the statute enabling the "release time program" was unconstitutional or that the regulations adopted by the respondents under the statute were arbitrary, capricious or unreasonable, whereupon the petition was dismissed as a matter of law.

concerned. There will be no announcement of any kind in the public schools relative to the program.

2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal, weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools. A different day may be designated for each borough.

5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

Opinions Below.

The opinion of the Supreme Court, Special Term, Kings County, reported in 198 Misc. 631, 99 N. Y. S. 2d 339, was affirmed by the Appellate Division, Second Judicial Department in 278 App. Div. 573, 102 N. Y. S. 2d 27. Subsequently, the order of said Appellate Division was affirmed by the Court of Appeals of New York by opinion reported in 303 N. Y. 161, 100 N. E. 2d 463.

Question Presented.

Is the instant New York released time program, as authorized by statute, unconstitutional upon the ground that it violates the prohibition against laws respecting an establishment of religion contained in the First Amendment of the Federal Constitution, as applied to the states by the Fourteenth Amendment, or upon the ground that it prohibits the free exercise of religion in violation of the First and Fourteenth Amendments of the Federal Constitution and Section 3, Article I. of the New York State Constitution?

ARGUMENT.

I.

The Constitutionality of Similar Released Time Programs Heretofore Has Been Determined by New York Courts.

● The New York Court twice prior to the instant case has sustained the constitutionality of similar released time programs to the one herein involved. Specifically, in 1925 a released time program in the City of Mt. Vernon, New York, had been declared invalid, as “. . . . contrary to the intent and meaning of Section 621 of the Education Law . . . requiring every child to attend upon instruction for the *entire time* during which the schools are in session,” and because public school presses were used to print the religious classes attendance cards. (*Stein v. Brown* (1925), 125 Misc. 692, 211 N. Y. Supp. 822.) However, two years later, a released time program of White Plains, New York, which differed from that of Mt. Vernon only in that the public school presses were not used to print the religious classes attendance cards, was held constitutional in *People ex rel. Lewis v. Graves* (1927), 245 N. Y. 195, 156 N. E. 662, by a unanimous Court of Appeals. Indeed, the New York Court of Appeals in *Zorach, et al. v. Clauson, et al.* (1951), 303 N. Y. 161, 100 N. E. 2d 463, 466, said:

“Binding precedent must therefore be found in our own decision of nearly twenty-five years ago in *Peo-*

ple *ex rel. Lewis v. Graves, supra*, which involved a released time program in the city of White Plains. Such program, except for the absence of a State enabling act, was substantially the same as the one now in issue. . . .

Both *Stein v. Brown, supra*, and *People ex rel. Lewis v. Graves, supra*, were decided prior to the passage of an enabling statute by the New York legislature. Subsequently, an enabling statute, New York Education Law 3210, subdiv. 1, para. b., L. 1940, Ch. 305, providing that absence from attendance upon instruction as required by that statute shall be permitted for religious observance and education under rules that the Commissioner of Education shall establish, was held constitutional in *Matter of Lewis v. Spaulding* (1948), 193 Misc. 66, 85 N. Y. S. 2d 682, appeal withdrawn 299 N. Y. 564, 85 N. E. 2d 791 (1949). In the *Matter of Lewis v. Spaulding*, the Supreme Court of New York considered the then rendered case of *People of the State of Illinois ex rel. McCollum v. Board of Education* (1948), 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649, 2 A. L. R. 2d 1338, and in declaring the enabling statute constitutional stated:

“ . . . the constitutionality of a released time program is to be tested by a consideration of the factual aspects of the particular program under scrutiny.”

II.

A California Released Time Program Authorized by Statute Has Been Held Constitutional by the California Court.

The preamble to the Constitution of California, reading as follows:

“We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution,”⁵

is almost a replica of the preamble of the Constitution of the State of New York, which declares:

“WE, the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, Do Establish This Constitution.”⁶

Section 4 of Article I of the Constitution of California in part provides that:

“... the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State;

Similarly, Article I, Section 3 of the New York State Constitution reads as follows:

“The free exercise and enjoyment of religious profession and worship, without discrimination or

⁵See: *Gordon v. Board of Education of City of Los Angeles* (1947), 78 Cal. App. 2d 464, 477, 178 P.2d 488, 495.

⁶See: Opinion of Supreme Court, Special Term, Kings County, Part 1, in *Zorach v. Clauson* (1950), 198 Misc. 631, 99 N. Y. S. 2d 339, 344.

preference, shall forever be allowed in this state to all mankind; . . . ”

Section 8 of Article IX of the California Constitution prohibits the appropriation of any public money for the support of any sectarian or denominational school,

“nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly, or indirectly, in any of the common schools of this State.”

Section 30 of Article IV of the Constitution of California⁸ prohibits the granting of anything in aid of any religious sect, church, creed or sectarian purpose.

Holding that the California law (California Education Code, Section 8286) and a released time plan in the City of Los Angeles did not violate the Constitution of the

⁷California Constitution, Article IX, Section 8, reads:

“No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.”

⁸California Constitution, Article IV, Section 30, provides:

“Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 22 of this article.”

United States nor any of the following provisions of the Constitution of the State of California, to-wit: Section 4 of Article I, Section 8, of Article IX, and Section 30 of Article IV, is the case of *Gordon v. Board of Education of City of Los Angeles* (1947), 78 Cal. App. 2d 464, 474, 476, 178 P. 2d 488, 494-495, hearing denied by our Supreme Court May 8, 1947.

In *Gordon v. Board of Education*, a unanimous court observed:

" . . . Reference to the debates of the constitutional convention which presented the Constitution of 1879 to the people of California demonstrates that there was no thought whatsoever in the minds of the framers of that document in opposition to or of hostility to religion as such. They proposed to insure separation of church and state, and to provide that the power and the authority of the state should never be devoted to the advancement of any particular sect or denomination. . . ."

Thereafter, this same court said:

"No one who keeps pace with the trends of modern society can deny that instruction of the youth of the state in faith and morality is of utmost necessity and importance. . . . What more logical advance could be made in the science of sociology than the unification of religious leaders in a coordinated effort to teach children faith and morality—and for that purpose to excuse them from schools for one hour a week to go to the church or tabernacle or synagogue of their parents' choice?"¹⁰

⁹78 Cal. App. 2d 464, 472-473, 178 P. 2d 488, 493.

¹⁰78 Cal. App. 2d 464, 474, 178 P. 2d 488, 494.

In the *Gordon* case, *supra*, is contained a powerful and well-reasoned concurring opinion by Mr. Justice White who wrote:

Throughout her entire argument, appellant misconceives the American principle of religious freedom. What she contends for, is freedom *from* religion rather than freedom *of* religion. Appellant's argument leads one to the conclusion that the doctrine of separation of church and state looks upon religion as something¹¹ intrinsically evil, and against which there should be a rigid quarantine. Nothing is farther from the true concept of the American philosophy of government than such an argument. In the constitution of every state of the union is to be found language which either directly, or by clear implication, recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community . . .¹¹

Further, Mr. Justice White declared:

"Under our California statute, no particular denomination or religious faith is favored, no part of the religious instruction is held in the schoolroom on school property, and no one is required to attend. To act in accordance with his lack of religion is the right of the man of no religion, but he has no right to insist that others shall have no religion."¹²

and that:

"The true and essential purpose of the American doctrine of separation of church and state is to protect people in the fullest enjoyment of religious freedom and to forestall compulsion by law of the accept-

¹¹78 Cal. App. 2d 464, 476, 178 P. 2d 488, 495.

¹²78 Cal. App. 2d 464, 479, 178 P. 2d 488, 497.

ance of any creed or the practice of any particular form of worship, but the decisions in both the federal and state courts furnish unmistakable authority for the proposition that the doctrine of separation of church and state does not mean that there is any conflict between religion and state in this country or any disfavor of any kind upon religion as such."¹³

Finally, as his reasons for sustaining the constitutionality of the California released time program, Mr. Justice White said:

"The essence of the Released Time Religious Education Program (Ed. Code, §8286) is to authorize governing boards of school districts, within their discretion, to permit pupils to be excused from school at the request of their parents for the purpose of attending classes of religious instruction maintained and operated by religious faiths of their own choosing. Examination of the statute reveals nothing opposed to the constitutional guarantee insuring religious liberty, freedom of conscience and preventing the establishment of a particular religion. The code section in question does not in any way interfere with religious freedom. It does not work an establishment of religion, provide for compulsory support, by taxation or otherwise, of religious instruction, make attendance upon religious worship compulsory, work a restriction upon the exercise of religion according to the dictates of conscience, or impose restrictions upon the expression of religious belief."¹⁴

For the very same reasons, this *Amicus Curiae* urges that the New York released time program herein under review, also is constitutional.

¹³78 Cal. App. 2d 464, 480, 178 P. 2d 488, 497-498.

¹⁴78 Cal. App. 2d 464, 478-479, 178 P. 2d 488, 497.

III.

The Case of People of State of Illinois ex rel. McCollum v. Board of Education Is Distinguishable From the Instant Case.

Appellees' attack on the constitutionality of the New York released time program herein under scrutiny is based almost exclusively upon the case of *People of the State of Illinois ex rel. McCollum v. Board of Education* (1948), 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 649, 2 A. L. R. 2d 1338, which held that a "released time" plan in use in Champaign, Illinois, violated the First and Fourteenth Amendments to the United States Constitution.

The main opinion in the *McCollum* case, *supra*, written by Mr. Justice Black, pointed out that:

"Illinois has a compulsory education law which, with exceptions, requires parents to send their children, aged seven to sixteen, to its tax supported public schools where the children are to remain in attendance during the hours when the schools are regularly in session. Parents who violate this law commit a misdemeanor punishable by fine unless the children attend private or parochial schools which meet educational standards fixed by the State. District boards of education are given supervisory powers over the use of the public school buildings within the school district."

In the Champaign case, the board of education of a school district permitted religious teachers employed by private religious groups to come weekly into the schools during regular school hours and for thirty or forty-five

¹⁵333 U. S. 203, 205, 68 S. Ct. 461, 462, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

minute periods. Classes were made up of pupils whose parents signed printed cards requesting that the child be permitted to attend. A council consisting of Jewish, Roman Catholic and Protestant faiths employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. Students who did not choose to take religious instruction were not released from classes but were required to go to some other place in the school building to pursue their secular studies. Students who were released for religious instruction were required to be present at the religious classes conducted in the regular classrooms of the school building and reports of their presence or absence were made to their secular teachers.

The main opinion by Mr. Justice Black in the *McCullum* case rejected the above plan in the following language:

"The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First

Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*, 330 U. S. 1, 67 S. Ct. 504.)”¹⁶

and further stated:

“Here not only are the state’s tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state’s compulsory public school machinery. This is not separation of Church and State.”¹⁷

In the *McCullum* case, the religious teachers employed by private religious groups, were permitted to come weekly into the school buildings during the regular school hours set apart for secular teaching and the religious instruction was given in the regular classrooms of the public school buildings. These peculiar facts justified the criticism in the *McCullum* case that the State helped to provide pupils for the religious classes through use of the compulsory school machinery. However, the released time program in New York City herein involved is free from the defects of the Champaign system for no tax-supported public school property or funds are used for the dissemination of religious doctrines, nor is New York’s compulsory education law used to assist in the enrollment of pupils for religious classes.

¹⁶333 U. S. 203, 209-210, 68 S. Ct. 461, 464, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

¹⁷333 U. S. 203, 212, 68 S. Ct. 461, 465-466, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

Moreover, in the *McCullum* case, Mr. Justice Frankfurter delivered a concurring opinion in which he was joined by Justices Jackson, Rutledge and Burton. In such opinion it was said the Champaign, Illinois, plan was unconstitutional because Illinois there authorized the commingling of sectarian with secular instruction in the public schools,¹⁸ because there religious instruction was so conducted on school time and property as to be *patently* woven into the working scheme of the school,¹⁹ and because the school authorities there sponsored and effectively furthered religious beliefs by its educational arrangement.²⁰

Yet the opinion of Mr. Justice Frankfurter joined in by three associates does point out that released time programs are not *per se* unconstitutional.

Specifically, Mr. Justice Frankfurter's opinion declares:

"Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some 'released time' classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual

¹⁸333 U. S. 203, 212, 68 S. Ct. 461, 466, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

¹⁹333 U. S. 203, 227, 68 S. Ct. 461, 473, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

²⁰333 U. S. 208, 231, 68 S. Ct. 461, 475, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court."²¹

Again, Mr. Justice Frankfurter wrote:

"We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial. Different forms which 'released time' has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid 'released time' program.

"22

Thereafter in a separate opinion Mr. Justice Jackson also recognized "permissible limits" when he said:

"While I agree that the religious classes involved here go beyond permissible limits, I also

²¹333 U. S. 203, 225, 68 S. Ct. 461, 472, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

²²333 U. S. 203, 231, 68 S. Ct. 461, 475, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

think the complaint demands more than plaintiff is entitled to have granted. So far as I can see this Court does not tell the State court where it may stop, nor does it set up any standards by which the State court may determine that question for itself."²³

Finally, Mr. Justice Reed in a dissenting opinion construed the ruling in the *McCullum* case as leaving open for further litigation variations from the Champaign, Illinois, plan.²⁴ However, Mr. Justice Reed unequivocally stated:

"Well-recognized and long-established practice support the validity of the Illinois statute here in question. That statute, as construed in this case, is comparable to those in many states. All differ to some extent. New York may be taken as a fair example."

²³25

Consequently, when in the *McCullum* case four justices opined that released time statutes are not *per se* unconstitutional and a fifth justice dissented from the declaration of unconstitutionality of the Champaign plan, it is apparent that the *McCullum* case cannot be regarded as authority for the proposition that all released time programs are invalid. To the contrary it would appear that the decision in each case as regards constitutionality will depend upon the particular facts and operating modes of

²³333 U. S. 203, 237, 68 S. Ct. 461, 478, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

²⁴333 U. S. 203, 240, 68 S. Ct. 461, 479, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

²⁵333 U. S. 203, 250-251, 68 S. Ct. 461, at 484, 92 L. Ed. 649, 2 A. L. R. 2d 1338, where Mr. Justice Reed cited with approval *People ex rel. Lewis v. Graves*, 245 N. Y. 195, 156 N. E. 663.

each such program, the pivotal questions of use of public property and funds, the participation by public school authorities, and the effect upon the children and the community.

The distinguishing features between the New York released time program herein being reviewed and the Champaign Plan declared unconstitutional in the *McCollum* case best were illustrated by Justice Di Giovanni of the Supreme Court in the form of the following chart [R. 90-91] setting in apposition distinctive features of both plans:

CHAMPAIGN PLAN.

1. No underlying enabling State statute.

2. Religious training took place in the school buildings and on school property.

NEW YORK CITY PLAN.

1. Education Law, Sec. 3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

2. Religious training takes place outside of the school building and off school property.

CHAMPAIGN PLAN.

3. The place for instruction was designated by school officials.

4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils.

5. School officials supervised and approved the religious teacher.

6. Pupils were solicited in school buildings for religious instruction.

7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds.

8. Non-attending pupils isolated or removed to another room.

NEW YORK CITY PLAN.

3. The place for instruction is designated by the religious organization in cooperation with the parent.

4. No element of segregation is present.

5. No supervision or approval of religious teachers or course of instruction by school officials.

6. School officials do not solicit or recruit pupils for religious instruction.

7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved.

8. Non-attending pupils stay in their regular classrooms continuing significant educational work.

9. No credit given for attendance at the religious classes.

CHAMPAIGN PLAN.

NEW YORK CITY PLAN.

10. No compulsion by school authorities with respect to attendance or truancy.

11. No promotion or publicizing of the released time program by school officials.

12. No public moneys are used.

Based upon the foregoing factual distinctions in the chart of Mr. Justice Di Giovanna hereinabove reproduced, this *Amicus Curiae* sincerely believes the instant New York released time program to be free from any of the defects which rendered the Champaign Plan unconstitutional in the *McCullum* case.

Conclusion.

It has been reported that more than 2,000,000 American school children in our public schools are participating in "released time" programs. *The Public and Education*, Vol. 3, No. 3, May 25, 1948.²⁶ Further, in *Gordon v. Board of Education of the City of Los Angeles* (1947), 78 Cal. App. 2d 464, 479, 178 P. 2d 488, 497, it was said that either by express statutory provisions, court deci-

²⁶See also: 39 Georgetown Law Journal 148, 150; 14 U. of Detroit Law Journal 216-217; and *People of the State of Illinois ex rel. McCullum v. Board of Education* (1948), 333 U. S. 203, 68 S. Ct. 461, 472, 92 L. Ed. 649, 2 A. L. R. 2d 1338.

sions, rulings of the State Attorneys General, or opinions of state boards of education or Chief State School Officers, forty states authorize the release of public school pupils for weekly religious instruction.

The State of California believes that it is both important and desirable for the Supreme Court of the United States now to clearly and unequivocally verify that its holding in the *McCullum* case was confined to the particular released time program therein reviewed, and that other and factually distinguishable released time programs in operation elsewhere may be free from constitutional objection.

Because of its sincere belief in the constitutionality of the program in the instant case, this *Amicus Curiae* adds its voice to those of the appellees and the other *Amici Curiae* in support of appellees' position, in the prayer that this Honorable Court affirm the judgment herein.

Respectfully submitted,

EDMUND G. BROWN,

Attorney General of California,

WILLIAM V. O'CONNOR,

Chief Deputy Attorney General,

HOWARD S. GOLDIN,

Deputy Attorney General,

Attorneys for Amicus Curiae, State of California.

Service of the within and receipt of a copy
thereof is hereby admitted this.....day of
January, A. D. 1952.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.

FILED

JAN 24 1952

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

No. 431

ZORACH, et al., Appellants,

VS.

CLAUSON, et al., Appellees.

BRIEF OF THE STATE OF WEST VIRGINIA

AMICUS CURIAE

WILLIAM C. MARLAND,
Attorney General,

THOMAS J. GILLOOLY,

T. D. KAUFFELT,

ESTON B. STEPHENSON,

Assistant Attorneys General.

INDEX

	Page
I. STATEMENT OF POSITION	1
1. Purpose and Scope	1
2. Interest of Amicus Curiae	2
II. ARGUMENT	3
1. The "released time" program of religious instruction in New York City does not violate the First and Fourteenth Amendments to the Constitution	3
2. This case does not fall within the rule established by this Court in the case of <i>People of the State of Illinois ex rel. Vashti McCollum v. Board of Education</i>	6
III. CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

People of the State of Illinois ex rel. Vashti McCollum v. Board of Education, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 648..... 6

Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070..... 4

Everson v. Board of Education, 330 U. S. 1, 91 L. Ed. 711, 67 S. Ct. 504..... 5-6

Cochran v. Louisiana State Board of Education, 281 U. S. 370, 74 L. Ed. 913, 50 S. Ct. 335..... 6

CONSTITUTION:

U. S. Constitution, 1st Amendment..... 8

U. S. Constitution 14th Amendment..... 8

STATUTES:

Code of W. Va., Chapter 18, Article 8, Section 1..... 2

IN THE
Supreme Court of the United States

October Term, 1951

No. 431

ZORACH, et al., Appellants,

vs.

CLAUSON, et al., Appellees.

**BRIEF OF THE STATE OF WEST VIRGINIA
AMICUS CURIAE**

STATEMENT OF POSITION

1. Purpose and Scope

The State of West Virginia, by its Attorney General and pursuant to Rule 27-9(d) of the Court, files this brief in opposition to the appeal of appellants to review the judgment of the Court of Appeals of New York, entered in the above entitled case on July 1, 1951, and reported in 100 N. E. 2d 463.

The purpose of this brief is to urge this Court to affirm the judgment of the Supreme Court of Appeals of New York.

The scope of this brief is to be confined to the following basic constitutional question: Do the First and Fourteenth Amendments prohibit the "released time" program of religious instruction in New York City?

2. Interest of this Amicus Curiae.

This basic constitutional question is of vital importance to the State of West Virginia. A decision by this Court reversing the New York Court on this question would raise a serious doubt as to the constitutionality of the "released time" program in the State of West Virginia, as authorized by Chapter 18, Article 8, Section 1 of the Code of West Virginia, which provides, in part, as follows:

"Compulsory school attendance shall begin with the seventh birthday and continue to the sixteenth birthday. Every person who has legal or actual control of a child or children not less than seven nor more than sixteen years of age shall cause such child or children to attend a free day school for the full school term of the county where such person resides.

"Exemption from the foregoing requirement of compulsory public school attendance shall be made on behalf of any child for the following causes or conditions, each such cause or condition being subject to confirmation by the attendance authority of the county:

“Exemption J. Church Ordinances; Observance of Regular Church Ordinances.—The county board of education may approve exemption for religious instruction upon written request of the person having legal or actual charge of a child or children: Provided, however, that such exemption shall be subject to the rules and regulations prescribed by the county superintendent and approved by the county board of education.”

This statute was enacted by the elected representatives of the people of this State in order that the strong religious traditions of the people of West Virginia might thereby be preserved and in order that the requirement of compulsory school attendance should not interfere with the right of parents to exercise freedom of conscience with respect to the religious instruction of their children.

II

ARGUMENT

1. The “Released Time” Program of Religious Instruction in New York City does not violate the First and Fourteenth Amendments to the Constitution.

The program under consideration represents the absolute minimum of cooperation between school and religious authorities with respect to “released time.” It goes no further than to permit children to be excused from school for one hour a week for religious instruction. Other than the recognition of this as a valid

reason for absence from school, there is no participation in the plan by anyone connected with the school system. In the *McCullum* case, in the concurring and dissenting opinions, a majority of this Court specifically recognized that "released time" as such is not unconstitutional. The opinion of the Court, delivered by Justice Black, confines the decision to facts radically different from those now before the Court.

Should this Court agree with appellants' contention as to the proper interpretation of that part of the First Amendment which forbids laws "respecting an establishment of religion," it is believed that it would necessarily endanger that part which also forbids laws "prohibiting the free exercise thereof." The natural right of parents to guide the education of their children has been guaranteed to them under the Constitution as interpreted by this Court. *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. With this in mind the constitutional right of parents to take advantage of a provision of state law allowing them to provide their children with religious instruction during a small portion of the time they are required to attend public schools should be beyond question. It might be suggested that such instruction could just as well be given some time other than during the school week. However, the parents' preference as to time should be controlling so long as the rights of others and the Constitution are not violated.

Special attention should be given to the historical background and meaning of the phrase "Congress shall make no law respecting the establishment of reli-

gion, * * *." We urge that an examination of the historical background of this phrase, as well as the traditional interpretation of it, especially in the early years of the nation, will foreclose any supposition that the scant recognition which the practice in New York gives to religion is in violation of the Constitution.

The nationwide practice of excusing pupils from school on holy days set apart by the various religions cannot be distinguished, to the advantage of appellants, from the program under consideration. Certainly, if a child may be excused to attend a religious ceremony he may be excused for the purpose of receiving instruction in the faith authorizing that ceremony.

This is merely a temporary suspension of the requirement of school attendance in order not to deprive children of their right to be instructed in religion at the time and in the manner elected by their parents. Complete authority is vested in the State Commissioner of Education to establish the rules under which absence from school shall be permitted. Therefore, the integrity of the school program is preserved intact. However, a way is provided so that the religious program need not be obstructed, and thus church and state placed in opposite warring camps.

Cooperation between governmental and religious institutions in many instances is so well known that it has become a part of the American way of life. Chaplaincies in the armed forces and Congress, the National School Lunch Act and compulsory church attendance at the service academies are examples. This Court has approved similar practices in *Everson*

v. *Board of Education*, 330 U. S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (use of public funds for transportation of children to parochial schools), and in *Cochran v. Louisiana State Board of Education*, 281 U. S. 370, 74 L. Ed. 913, 50 S. Ct. 335 (free textbooks for children in private schools). The incidental benefit to religion in the above cases is comparable to that received by religion in this case.

2. This Case does not fall within the Rule established by This Court in the Case of *People of the State of Illinois ex rel. Vashti McCollum v. Board of Education*.

People of the State of Illinois ex rel. Vashti McCollum v. Board of Education, 333 U. S. 203, 68 S. Ct. 461, 92 L. Ed. 648, is not a precedent in the instant case. In the *McCollum* case the appellant brought her action on the basis of being a taxpayer and, as such, injured by the use of tax-supported property for religious education. We do not see how appellants in this case can claim any such injury. Here, as opposed to the *McCollum* case, tax-supported school property was not used in any degree in giving religious instructions. The teachers giving the religious instructions were neither selected, supervised or approved by school authorities. Neither were pupils solicited in the school, nor by school authorities.

The most that can be said of appellees in this case is that they permitted children to leave the school at the request of their parents and maintained a record as to their whereabouts.

The regulations of the appellees do not, as the Court stated in the *McCollum* case, "authorize the comming-

ling of sectarian with secular instruction in the public schools," which the court stated the Constitution of the United States forbids. In the opinion of the Court in the *McColum* case, Justice Black recognized, by implication, that the opinion was based upon the facts of that case and was not such as to declare all the "released time" programs unconstitutional. Mr. Justice Frankfurter in his concurring opinion specifically stated that "released time" as such is not unconstitutional. He recognized that facts substantially differing from those in the *McColum* case might serve as a basis for an opinion contrary to that which he wrote.

If "released time" as such is not unconstitutional, the instant case presents facts that must lead inevitably to the conclusion that this "released time" program is constitutional. The instant case is one of minimum cooperation between the school officials and the persons furnishing the religious instruction, and the absolute lack of the use of tax-supported facilities to further religious instruction. Unless this Court is prepared to say that a parent may not request that his child be released from school for a period of time for a religious undertaking under any circumstances, we believe that this Court must affirm the position of the Court from which this case was appealed.

CONCLUSION

It is submitted that it has been demonstrated that the questions presented by this case are of vital importance to the State of West Virginia. The First and Fourteenth Amendments to the Constitution were manifestly not intended to operate so that a sovereign state would be prevented from providing by law for the minimal cooperation between church and state which is entailed by the "released time" program under consideration. We request that the judgment of the Court of Appeals of New York be affirmed and the appeal dismissed.

Respectfully submitted,

WILLIAM C. MARLAND,
Attorney General,

THOMAS J. GILLOOLY,
T. D. KAUFFELT,
ESTON B. STEPHENSON,
Assistant Attorneys General.

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.

FILED

JAN 26 1952

CHARLES CLARKE COMPTON
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951 A. D.

No. 431

TESSIM ZORACH and ESTA GLUCK,Appellants

vs.

**ANDREW G. CLAUSON, JR.,
MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN,
GEORGE A. TIMONE and JAMES MARSHALL,
Constituting the Board of Education
of the City of New York, et al.Appellees**

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

**Brief of J. D. Buckman, Jr., Attorney General, and M. B.
Holifield, Assistant Attorney General, for and on
behalf of the Commonwealth of Kentucky as amicus
curiae.**

**J. D. BUCKMAN, JR.,
Attorney General of Kentucky**

and

**M. B. HOLIFIELD,
Assistant Attorney General**

INDEX

	Page
I. STATEMENT	1
Sec. 152, 220, Kentucky Revised States	1
State of Ill. Ex. Rel. McCollum v. Board of Education; 333 Ill. 203, 68 S. Ct. 461, 92 L. Ed. 648	2
II. ARGUMENT	2-7
Applicable Parts Sec. 1, State Constitution of Ky.	2
Sec. 5, State Constitution of Ky.	2
Sec. 189, State Constitution of Ky.	3
Amendment (1) to Federal Constitution U. S.	3
Applicable Parts of 14th Amendment to Federal Constitution	3
Murdock v. Pa. 319 U. S. 105, 87 L. Ed. 1292	4
III. DEFINITION OF PERSONAL LIBERTY	4
Meyer v. State of Nebraska, 262 U. S. 390, 399 67 L. Ed. 1042, 1045	4
IV. LIMITATIONS OF THE STATE AND FEDERAL GOVERNMENTS IN DEALING WITH PERSONAL LIBERTY OF THE CITIZEN	4
Meyer v. State of Nebraska, 262 U. S. 390, 401, 67 L. Ed. 1042, 1046	4
V. THE RIGHT OF THE CITIZEN TO EDUCATE HIS CHILD IN RELIGIOUS MATTERS	5
Prince v. Commonwealth of Mass., 321 U. S. 158, 165, 166; 88 L. Ed. 645, 652	5
Pierce v. Society of Sisters of the Holy Name of Jesus and Mary, 268 U. S. 510, 535; 69 L. Ed. 1070, 1078	6
Everson v. Board of Education of the Township of Ewing, et al., 330 U. S. 1, 90 L. Ed. 711, 725	6

Supreme Court of the United States

OCTOBER TERM, 1951, A. D.
No. 431

TESSIM ZORACH AND ESTA GLUCK, *Appellants*
vs.

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN,
GEORGE A. TIMONE, AND JAMES MARSHALL,
Constituting the Board of Education
of the City of New York, Et Al.

*Brief of J. D. BUCKMAN, JR.,
Attorney General of Kentucky
And M. B. HOLIFIELD, Assistant
Attorney General, Amicus Curiae*

MAY IT PLEASE THE COURT:

The Attorney General of Kentucky, on behalf of the Commonwealth of Kentucky, joins the Appellees and their amicus curiae in submitting that the judgment of the New York Court of Appeals should be affirmed on the ground that the Statute and rules and regulations adopted pursuant thereto by the New York Commissioner of Education and New York State Board of Education are constitutional and valid as against Appellants' attack on them.

I

STATEMENT

The Commonwealth of Kentucky has a statute, Section 152.220, Kentucky Revised Statutes, which authorizes the

program of release time for religious education to be implemented through parents or guardians of children whose church or churches have sought to establish a program of this nature. Invalidation by this court of the New York Statute and the rules and regulations promulgated pursuant thereto would seriously hinder the educational program as it is evolved in Kentucky. Since the decision in the case of *People of the State of Illinois Ex Rel. McCollum v. Board of Education*, 333 Ill. 203, 68 S. Ct. 461, 92 L. Ed. 648, the Kentucky program, and it is assumed those of other States has been impaired to a great degree for fear of overstepping the boundaries whatsoever they may be, as outlined in the *McCollum* decision regarding religious education and the First Amendment to the United States Constitution. It is with this thought that we felt it appropriate to make this short presentation in the present case.

II ARGUMENT

It is respectfully called to the attention of this Honorable Court that the applicable parts of Section (1) of the Constitution of Kentucky provide:

"All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned;

First: The right of enjoying and defending their lives and liberties.

Second: *The right to worship Almighty God according to the dictates of their consciences.*

Third: The right of seeking and pursuing their safety and happiness.

Fourth: The right of *freely communicating their thoughts and opinions.*" (Emphasis ours).

Section 5 thereof, provides:

"No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection

or maintenance of any such place, or to the salary or support of any minister of religion; *nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed*; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. *No human authority shall, in any case whatever, control or interfere with the rights of conscience.*" (Emphasis ours).

This section recognizes the unquestioned right of the Kentucky parent to control the religious education of his child.

Section 189 of the State Constitution further provides:

"No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to or used by, or in aid of, any church, sectarian or denominational school."

An examination of the foregoing provisions of the Constitution of Kentucky discloses that there is a stronger separation between church and state and a more determined protection granted to each individual in the preservation of his personal liberty, the right of conscience and the protection of his children from any deleterious influence with respect to religion while attending school, and the right and power to communicate his thoughts and opinions to others than is contained in the First Amendment to the Federal Constitution which provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

But the applicable parts of Subsection (1) of the 14th Amendment to the Federal Constitution provides:

"* * * Nor shall any state deprive any person of life, liberty, or property, without due process of law."

No state has the right to arbitrarily restrict the personal liberty of its citizens in religious matters since the ratification of the 14th Amendment to the Federal Constitution which applies the prohibitions of the First Amendment to the legislatures of the respective states. See *Murdock v. Pennsylvania*, 319 U. S. 105, 87 L. Ed. 1292.

III.

DEFINITION OF PERSONAL LIBERTY.

The United States Supreme Court in the case of *Meyer v. State of Nebraska*, 262 U. S. 390, 399, 67 L. Ed. 1042, 1045, in speaking through Mr. Justice McReynolds, said:

IV.

LIMITATIONS OF THE STATE AND FEDERAL GOVERNMENT IN DEALING WITH PERSONAL LIBERTY OF THE CITIZEN

"Liberty" denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Emphasis ours).

In the same case and on page 401 of 262 U. S., and 1046 of 67 L. Ed. again he said:

"That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all,—to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution,—a desir-

able end cannot be promoted by prohibited means."
(Emphasis ours).

V.

THE RIGHT OF THE CITIZEN TO EDUCATE HIS CHILD IN RELIGIOUS MATTERS

Again, in the case of *Prince v. Commonwealth of Massachusetts*, 321 U. S. 158, 165, 166, 88 L. Ed. 645, 652, the Supreme Court of the United States, in speaking through Mr. Justice Rutledge, said:

"The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in West Virginia State Bd. of Edu. v. Barnette, 319 U. S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178, 147 ALR 674. Previously in Pierce v. Society of Sisters, 268 U. S. 510, 69 L. Ed. 1070, 45 S. Ct. 571, 39 ALR 468, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in Meyer v. Nebraska, 262 U. S. 390, 67 L. Ed. 1042, 43 S. Ct. 625, 29 ALR 1446, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." (Emphasis ours).

In this enunciation by this court, the right of the citizen to worship God according to the dictates of his conscience and to teach, or cause his child to be taught that system of worship, cannot be restrained by the State unless the exercise of this protected personal liberty in the way and man-

ner it is being exercised by the citizen threatens immediate disaster to the legitimate program of either the State or Federal Government.

Again, in the case of *Pierce v. Society of Sisters of the Holy Name of Jesus and Mary*, 268 U. S. 510, 535, 69 L. Ed. 1070, 1078, this court in speaking through Mr. Justice McReynolds, said:

"As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (Emphasis ours).

And, last but not least, in *Everson v. Board of Education of the Township of Ewing, et al*, 330 U. S. 1, 91 L. Ed. 711, 725, this court, in speaking through Mr. Justice Black, said:

"State power is no more to be used so as to handicap religions than it is to favor them."

We recognize the fact that the state has the right to see that every citizen is so educated that he will have the ability to and the desire to exercise every activity that will promote the legitimate purposes of the Federal or State government or to protect those governments when they are imperiled by war. But the future citizens of the state and nation are entitled to be instructed in religious matters in harmony with the beliefs of their parents. This is a part of the parents' personal liberties that is protected by the Constitution of the Federal Government and the Constitution of the respective States, and neither the Federal Government nor the State can limit the personal liberty of those

parents in thus teaching their children or having them taught unless the exercise of this liberty at the time and place will endanger the necessary program of the State or Federal Government to the immediate disaster of such program of either the State or the Federal Government.

The rules and regulations adopted by the New York Commissioner of Education and the New York City Board of Education is protecting the parents in exercising personal liberty, protected by both the State and the Federal Constitution in the education of their children in the worship of God according to the dictates of the consciences of the respective parents.

The Appellants are seeking to bar the State of New York from giving this constitutional privilege to its parents. They cannot do so without limiting the personal liberty of those parents. The granting of this privilege does not interfere with any privilege or right of the Appellants. They disclose no danger resulting to either the State of New York or the Federal Government by parents exercising the privilege granted by Appellees. Therefore, the Commonwealth of Kentucky joins the State of New York and the other States who have filed briefs amicus curiae in supporting the judgment of the New York Court of Appeals in the instant case, and we respectfully request the affirmance of the judgment of the court of last resort of New York herein.

Respectfully submitted,

COMMONWEALTH OF KENTUCKY

By: J. D. BUCKMAN, JR.,

Attorney General and

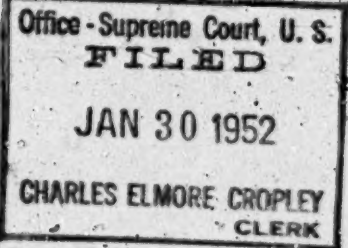
M. B. Holifield

M. B. HOLIFIELD,

Assistant Attorney General.

No 431

LIBRARY
SUPREME COURT, U.S.



IN THE MATTER OF THE APPLICATION OF
TESSIM ZORACH AND ESTA GLUCK,
Petitioners-Appellants,

for an order pursuant to Article 78 of
the Civil Practice Act,

against

ANDREW C. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE
A. TIMONE, AND JAMES MARSHALL, constitut-
ing the Board of Education of the City of
New York, and FRANCIS T. SPAULDING, Com-
missioner of Education of the State of New
York,

Respondents,

directing them to discontinue certain
school practices,

and against

THE GREAT NEW YORK COORDINATING COMMITTEE
ON RELEASED TIME OF JEWS, PROTESTANTS AND
ROMAN CATHOLICS,

Intervenor-Respondent.

BRIEF FOR THE STATE OF MAINE, AMICUS CURIAE

State of Maine
By Alexander A. LaFleur
Attorney General

IN THE MATTER OF THE APPLICATION OF

TESSIM ZORACH AND ESTA GLUCK,
Petitioners-Appellants,

for an order pursuant to Article 78 of
the CIVIL PRACTICE ACT,

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS,
ANTHONY CAMPACNA, HAROLD C. DEAN, GEORGE
A. TIMONE, AND JAMES MARSHALL, constitut-
ing the Board of Education of the City of
New York, and FRANCIS T. SPAULDING, Com-
missioner of Education of the State of New
York,

Respondents,

directing them to discontinue certain
school practices,

and against

THE GREATER NEW YORK COORDINATING COMMITTEE
ON RELEASED TIME OF JEWS, PROTESTANTS AND
ROMAN CATHOLICS,

Intervenor-Respondent.

BRIEF FOR THE STATE OF MAINE, AMICUS CURIAE

The State of Maine submits this brief in support of the constitutionality of section 3210 of the New York Educational Law, under which the State Commissioner of Education and the Board of Education of the City of New York are authorized to issue regulations to excuse children from school for one hour per week for religious education under the so called "released time" program.

The State of Maine, through one of the constitutional agencies, has sponsored released time religious education for many years, and believes that it involves no violation of the constitutional provision guaranteeing freedom of religion and forbidding the "establishment" of religion.

ARGUMENT

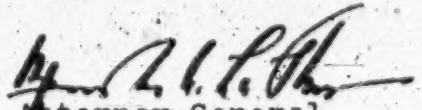
Maine joins the Appellees and other amici curiae in submitting that the judgment of the New York Court of Appeals should be affirmed on the ground that the statute and rules and regulations adopted pursuant thereto by the New York Commissioner of Education and the New York City Board of Education are constitutional and valid as against Appellant's attack on them.

Maine has a statute, Chapter 37, Section 129, Revised Statutes of Maine, 1944, which authorizes the program of release time for religious education to be implemented by organizations who through the wish of individual parents, have sought to establish a program of this nature.

Invalidation by this Court of the New York statute and the regulations promulgated pursuant thereto would seriously hinder the educational program as it has evolved in Maine. Since the decision in People of State of Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 648, Maine's program, and it is assumed those of other States, has been impaired to a great degree for fear of overstepping the boundaries, whatever they may be, as outlined in the McCollum decision regarding religious education and the first amendment to the United States Constitution. It is with this thought that we have felt it appropriate to make this short presentation in the present case.

CONCLUSION

For the reasons suggested in this brief and argued in the briefs of Appellee, as well as those of other Amici Curiae, Maine respectfully submits that the judgment under consideration and review by this Honorable Court be sustained.


Attorney General
of Maine

LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED
JAN 31 1952
CHARLES ELMORE CROLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1951

NO. 431.

TESSIM ZORACH and ESTA GLUCK, Appellants,

v.

**ANDREW G. CLAUSON, JR. et al., constituting the
Board of Education of the City of New York, and
FRANCIS T. SPAULDING, Commissioner of
Education of the State of New York.**

**On Appeal from the Court of Appeals of the State of
New York.**

**BRIEF FOR COMMONWEALTH OF PENNSYLVANIA
AS AMICUS CURIAE**

**HARRY F. STAMBAUGH,
Special Counsel**

**ROBERT E. WOODSIDE,
Attorney General**

**Attorneys for the
Commonwealth of Pennsylvania.**

Supreme Court of the United States

OCTOBER TERM, 1951

NO. 431.

TESSIM ZORACH and ESTA GLUCK, Appellants,

v.

ANDREW G. CLAUSON, JR. et al., constituting the
Board of Education of the City of New York, and
FRANCIS T. SPAULDING, Commissioner of
Education of the State of New York.

On Appeal from the Court of Appeals of the State of
New York.

BRIEF FOR COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

RELEASED TIME IN PENNSYLVANIA

Section 1546 of the Pennsylvania Public School Code of 1949 (Pamphlet Laws 49, p. 30), 24 Purdon's Penna. Stat. Section 15-1546) provides in regard to released time:

"Any board of school directors of any school district shall have power to enter into suitable arrangement with a religious group, or organization of responsible citizens resident in the school district, who are interested in organizing part-time week-

day religious education for school pupils. In such cases the board of school directors shall have the power to adopt such rules and regulations for the release from school sessions of those pupils whose parents, or surviving parent, or guardian, or other person having legal custody of such pupil, desires to have them attend a class to receive religious education, in accordance with their religious faith for not more than one hour a week, subject, however, to such conditions and the keeping of such records of attendance at such classes and other records for the inspection of school authorities as the board shall deem proper. No part of the cost and expense of such religious instruction shall be paid out of public school funds."

The compulsory education law of Pennsylvania requires a pupil to attend the public schools for the full period of time prescribed by the statute. Unless the parent asks for his release, the pupil remains in school throughout the number of hours required.

The efficient cause of the release of the child under the above statute is, therefore, the request of the parent made in the exercise of the parent's right to supervise the religious training of the child.

In opinion No. 584, dated July 25, 1948, the attorney general of Pennsylvania, conforming to the decision of this court in the *McCollum* Case, advised the Superintendent of Public Instruction that released time for religious instruction during school hours in public school buildings violated the Federal Constitution (Penna. Op. Atty. Gen., 1947-1948, page 150).

In released time there is now no use of the school buildings for religious instruction and no expenditure of public funds for such purpose.

If no such request is made by the parent, the child is required to remain in the public schools in order to comply with the compulsory education law. No part of this required time is spent in religious training in the public school building, as was done in the *McCollum* case.

The parent's request for release frees the pupil entirely from the operation of the public school law for the limited period of released time.

The school authorities do not compel or persuade the pupil to attend a church school. They merely accede to the request of the parent.

The school authorities do get report of the attendance of the pupil at the church school. This is required merely as a precaution to insure that the compulsory education law is not being evaded by a wayward pupil or an indulgent parent. The effective enforcement of the compulsory education law requires the school to get this report. Attendance at a church school is at regular recurring intervals, and in view of the greater total time consumed the report is necessary. In other respects released time to attend a church school does not differ from released time for a pupil to take a music lesson or keep a dental appointment.

McCollum v. Board of Education, 333 U. S. 203, (1948) differs in that—

-4-

(1) Sectarian religious classes were conducted in the regular class rooms of the public school building;

(2) The religious teachers who furnished such instruction were subject to the approval and supervision of the superintendent of schools;

(3) A particular sect was required to get the permission of the school superintendent to supply a teacher and the superintendent had the authority to determine whether it was practical for that sect to teach during the school session;

(4) Public school teachers distributed to pupils request cards supplied by the church groups.

The Pennsylvania statute quoted above, provides that "no part of the cost and expense of such religious instruction shall be paid out of public school fund".

As already shown, there is now no requirement that such religious classes be held in the school building and the practice has been to hold them at a place furnished by the religious denomination.

Respectfully submitted,

HARRY F. STAMBAUGH
Special Counsel

ROBERT E. WOODSIDE
Attorney General.

Attorneys for the Commonwealth
of Pennsylvania

LIBRARY
SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM—1951, No. 431

Office: Supreme Court, U. S.

JAN 5 1952

CHARLES ELMORE CROPLEY
CLERK

In the Matter of the Application of
TESSIM ZORACH and ESTA GLUCK,
Petitioners-Appellants,

for an order Pursuant to Article 78 of
the Civil Practice Act,

against

**ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, AN-
THONY CAMPAGNA, HAROLD C. DEAN, GEORGE A.
TIMONE and JAMES MARSHALL,** constituting the Board of
Education of the City of New York, and **FRANCIS T. SPAULD-
ING,** Commissioner of Education of the State of New York,
Respondents,

directing them to discontinue certain school practices,

and against

**THE GREATER NEW YORK COORDINATING COMMIT-
TEE ON RELEASED TIME OF JEWS, PROTESTANTS
and ROMAN CATHOLICS,**

Intervenor-Respondent.

**MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS
CURIAE BY NATIONAL COUNCIL OF THE CHURCHES
OF CHRIST IN THE UNITED STATES OF AMERICA**

ORRIN G. JUDD,
655 Madison Avenue,
New York 21, N. Y.,

ROBERT MCC. MARSH,
15 William Street,
New York 5, N. Y.,

Counsel for National Council
of the Churches of Christ in
the United States of America.

Supreme Court of the United States

OCTOBER TERM—1951, No. 431

In the Matter of the Application of

TESSIM ZORACH and ESTA GLUCK,

Petitioners-Appellants,

for an order pursuant to Article 78
of the Civil Practice Act,

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY
CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE and
JAMES MARSHALL, constituting the Board of Education
of the City of New York, and FRANCIS T. SPAULDING,
Commissioner of Education of the State of New York,
Respondents,

directing them to discontinue certain school practices,

and against

THE GREATER NEW YORK COORDINATING COMMITTEE ON RE-
LEASED TIME OF JEWS, PROTESTANTS and ROMAN CATHO-
LICS,

Intervenor-Respondents.

**MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS
CURIAE, BY NATIONAL COUNCIL OF THE CHURCHES
OF CHRIST IN THE UNITED STATES OF AMERICA**

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSO-
CIATE JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

NOW COME ORRIN G. JUDD and ROBERT MCC. MARSH,
Esqs., on behalf of National Council of Churches of Christ
in the United States of America, and respectfully move

this Court, pursuant to Rule 27, Paragraph 9, of the Rules of this Court, for leave to file a brief in this case, as *amicus curiae*.

The consent of the attorneys for Petitioners-Appellants to file such a brief was requested but refused; the attorneys for all other parties have stated that they would consent to the filing of such a brief.

The interest of the National Council and its reasons for asking leave to file a brief *amicus curiae* are set forth below.

The National Council of the Churches of Christ in the United States of America is a New York corporation, incorporated under the Membership Corporations Law of the State of New York. The religious denominations which participated in creating the National Council are the following twenty-nine, having about 32,000,000 members in the United States:

- African Methodist Episcopal Church
- African Methodist Episcopal Zion Church
- American Baptist Convention
- Augustana Lutheran Church
- Church of the Brethren
- Colored Methodist Episcopal Church
- Congregational-Christian Churches /
- Disciples of Christ
- Danish Evangelical Lutheran Church
- Evangelical and Reformed Church
- Evangelical United Brethren Church
- Evangelical Unity of Czech Moravian Brethren in
N. A.
- Friends-Five Year Meeting
- Friends of Philadelphia Vicinity

Methodist Church

Moravian Church (Northern and Southern Provinces)

National Baptist Convention of America

National Baptist Convention, U. S. A., Inc.

Presbyterian Church in the U. S.

Presbyterian Church in the U. S. A.

Protestant Episcopal Church

Reformed Church in America

Roumanian Orthodox Episcopate of America

Russian Orthodox Church in America

Seventh Day Baptists, General Conference

Syrian Antiochian Orthodox Church

Ukrainian Orthodox Church of America

United Lutheran Church in America

United Presbyterian Church of N. A.

In addition, the Greek Orthodox Church, with 1,000,000 communicants, was recently admitted to membership.

One of the express purposes of the incorporation of the National Council was to continue and extend the work of the following pre-existing organizations:

Federal Council of the Churches of Christ in America

Foreign Missions Conference of North America

Home Missions Council of North America

International Council of Religious Education

Missionary Education Movement of the United States and Canada

National Protestant Council on Higher Education

United Council of Church Women

United Stewardship Council

The National Council constitutes the major organ for cooperative work of the principal Protestant denomina-

tions in the United States. Created in 1950, by a merger of the above-listed separate interdenominational agencies, it carries on the functions and work of the International Council of Religious Education, which has been in the forefront of the national movement for religious education on released time since its inception.

As the single nation-wide co-operative agency of the major Protestant denominations, the National Council is directly affected by and seriously concerned with the attempt made by Appellants in this case to terminate a program which one of its predecessors has sponsored for years. The International Council of Religious Education, the particular predecessor involved, was incorporated by Act of Congress in 1907 under the name, International Sunday School Association of America. As the official cooperative agency of forty denominational Boards of Christian Education and thirty-three State Councils of Churches, it was actively identified with the released time movement.

Released-time religious education represents a plan under which children who attend public schools can be given an opportunity for religious instruction, without any preference by the state in favor of one faith over another and without using school premises or other public property for such instruction. The growing secularization of education in publicly-supported schools has resulted in the gradual elimination of the religious element which was once an important part of all education.

It is believed that none of the parties to this action are in a position adequately to present the views, interests and work of the several Protestant denominations which, through their national agency, the National Council of the Churches of Christ in the United States of America, and its predecessor organization, have fostered and developed a program of released-time week-day religious

education, which now involves almost 2,000,000 pupils, located in almost every one of the forty-eight states.

In any controversy centering about the principle of separation of Church and State—a principle which has been traditionally espoused by the Protestant denominations here represented in the National Council—the considered judgment of that national agency as to what constitutes violation of the constitutional provision prohibiting laws respecting the establishment of a religion, should have weight. Protestant agencies have made studies of the relation between religion and education, which are definitely relevant to the disposition of this case, and which we believe will not be covered by the briefs of either the governmental respondents or the inter-faith organization which is an intervenor in the proceeding.

The resolution to seek leave to file a brief as *amicus* in this Court was adopted at a meeting of the General Board of the National Council, which consists of 125 members, selected by the constituent denominations.

The brief for the National Council will be in galley form so that it can be filed within a very few days after counsel are notified of the decision by this Court, granting leave to file such a brief.

The Court of Appeals of New York granted the National Council leave to file a brief as *amicus curiae* when this case was before that Court.

WHEREFORE, the Court is respectfully requested to grant the motion for leave to file a brief *amicus curiae*.

Dated: New York, N. Y.
January 4, 1952.

Respectfully submitted,

ORRIN G. JUDD,
655 Madison Avenue,
New York 21, N. Y.,

ROBERT McC. MARSH,
15 William Street,
New York 5, N. Y.,

Counsel for National Council of
the Churches of Christ in the
United States of America.